Supreme Court, U.S.
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No.

In the Supreme Court of the United States

PHILLIP L. KEPHART,

Respondent,

v.

BRIAN BELLEQUE, Superintendent,
Oregon State Penitentiary,

Petitioner.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, Kephart, an inmate imprisoned under state court judgments, was transferred from a state correctional institution to a privately-run out-of-state facility. When he finally filed a federal habeas petition, it was filed too late. Kephart claimed, however, that he was entitled to equitably toll part of the time that he spent in the out-of-state prison facility because the law library there was inadequate. Although the district court rejected that claim, the Court of Appeals for the Ninth Circuit disagreed and reversed, ordering that Kephart is entitled to an evidentiary hearing on his equitable tolling claim. Specifically, the court held that Kephart's allegations and submissions should be treated as *pro se* ones, even though he had been appointed counsel who had submitted additional materials in support of the equitable tolling claim. The court also held that Kephart was entitled to an evidentiary hearing on equitable tolling even though he provided no specifics about his use of the out-of-state prison law library. In addition, the court determined that Kephart's allegations were sufficient to show that he diligently pursued his rights even though he claimed only that he used the law library on occasion and that it lacked materials regarding federal law.

The questions presented in this case are:

1. When a habeas petitioner is represented by counsel who has had the opportunity to, and did, supplement the record and file additional materials regarding equitable tolling – the central issue before the district court -- and when the district court has reviewed those additional materials in rejecting that claim and denying relief, should the appellate court continue to view the petitioner's filings and evidentiary submissions as though he were proceeding *pro se* and apply the lenient standard of review that is granted to *pro se* pleadings?

2. Is equitable tolling available to permit the filing of an otherwise untimely petition seeking relief in federal habeas corpus or do the provisions of 28 U.S.C. § 2244(d) fully define and circumscribe the circumstances in which the Anti-Terrorism and Effective Death Penalty Act (AEDPA) one-year statute of limitations can be tolled or extended?

3. Assuming that equitable tolling applies in the AEDPA context, are conclusory allegations of diligence enough to warrant an evidentiary hearing on equitable tolling, or is more specificity required?

4. Again assuming that equitable tolling applies, is a showing of minimal effort a sufficient showing of diligence to warrant an evidentiary hearing on equitable tolling, or is more required?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, the Superintendent of the Oregon State Penitentiary, respectfully prays that the Court issue a writ of certiorari to review the judgment and decision of the Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decisions of the Ninth Circuit Court of Appeals are reported, *Roy v. Lampert,* 455 F.3d 945, *amended* 465 F.3d 964 (9th Cir. 2006), and are in the appendix to this petition. (Pet. App. 14, 31).[1] The court issued its amended opinion after petitioner filed a petition for rehearing and suggestion for rehearing en banc. The magistrate judge's findings and recommendation, the district court's order adopting the findings and recommendation, and the district court's judgment dismissing this habeas corpus proceeding also are in the appendix. (Pet. App. 1, 7, 10).

JURISDICTION

Jurisdiction to review the judgment by writ of certiorari is conferred on the Court by 28 U.S.C. § 1254(1). The Ninth Circuit's initial decision was filed on July 12, 2006. *Roy v. Lampert,* 455 F.3d 945 (9th Cir. 2006). After obtaining an extension of time from that court, on August 23, 2006 petitioner timely filed his petition for panel rehearing and suggestion for rehearing en banc.[2] On September 22, 2006, the Ninth Circuit issued its amended opinion. *Roy,* 465 F.3d

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[1] The Ninth Circuit consolidated the appeal in this case with the appeal in *Roy v. Lampert. See Roy,* 465 F.3d at 967 (noting that the court consolidated the cases). Petitioner seeks the issuance of a writ of certiorari in *Kephart* only.

[2] That petition sought rehearing in Kephart's case only.

964. This Court later granted petitioner's application for an extension of time to file this petition for a writ of certiorari to and including January 22, 2007. This petition is being filed within the time granted by this Court.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2244(d) provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to a judgment of a State court. The limitation period shall run from the latest of –
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> >
> > (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> >
> > (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

STATEMENT OF THE CASE

This is a habeas corpus proceeding brought by respondent Kephart, a prisoner in state custody, pursuant to 28 U.S.C. § 2254. The state and federal court proceedings in respondent's case are summarized below.

1. State trial and direct appeal

In the underlying state court proceedings (involving two separate criminal cases), respondent Kephart was convicted of four counts of second-degree assault, one count of first-degree assault, one count of attempted first-degree assault, and two counts of criminal mistreatment. *Roy,* 465 F.3d at 967. The judgments in those cases were entered on November 18, 1991. (E.R. 22, 25).[3] Kephart appealed, and the Oregon Court of Appeals affirmed his convictions. *Roy,* 465 F.3d at 968. He petitioned for review in the Oregon Supreme Court, and that court granted review and remanded to the Court of Appeals. *Id.* The state Court of Appeals affirmed Kephart's convictions on remand, and he did not seek review in the Oregon Supreme Court or file a petition for certiorari in this Court. *Id.* The appellate judgment issued, and Kephart's direct appeal became final, on December 8, 1995. *Id.*

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[3] E.R. refers to the excerpt of record filed with the Ninth Circuit Court of Appeals.

2. Transfer to Arizona facility

On February 7, 1996, Kephart was transferred to a privately-run correctional facility in Florence, Arizona. *Id.* He did not return to an Oregon institution until July 14, 1997. *Id.* It is the adequacy (or the alleged inadequacy) of the law library at the Arizona facility that is the centerpiece of Kephart's equitable tolling claim.

3. State post-conviction and appeal

While he was still at the Arizona facility, on May 6, 1997, Kephart filed a petition seeking state post-conviction relief. *Id.* In that petition (which was filed *pro se*), Kephart raised claims of inadequate assistance of his trial counsel and claims that the sentences imposed on him were excessive. (E.R. 37, 38). On October 6, 1998, the state trial court entered a judgment denying him relief in post-conviction. (E.R. 41-42).[4] The state Court of Appeals affirmed; the Oregon Supreme Court denied review; and the post-conviction appeal became final on October 23, 2000. *Roy,* 465 F.3d at 968.

4. Federal habeas corpus

a. District court

On May 14, 2001 – almost seven months after his state post-conviction case became final – Kephart filed a *pro se* petition seeking relief in habeas corpus. *Id.* In that petition, he raised claims of trial court error and of ineffective assistance of his trial and his appellate counsel on direct appeal. (E.R. 5, 7-12). With his petition Kephart filed a motion seeking the

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[4] The Ninth Circuit mistakenly stated that "state post-conviction relief was denied on July 17, 1997." *Roy,* 465 F.3d at 968. That mistake does not appear to bear significantly on the court's analysis.

appointment of counsel. (E.R. 186). That motion was denied without prejudice on September 13, 2001; Kephart filed a second motion asking that counsel be appointed, and that motion was granted on December 20, 2001. (E.R. 187). Kephart has been represented by counsel from that point on.

In the meantime, however, on October 12, 2001, Kephart filed a *pro se* response to the district court's order to show cause why his petition should not be dismissed on the ground that it was not timely. (E.R. 13). In that response, Kephart raised claims of statutory and equitable tolling.[5] Kephart conceded that he was "past the one year filing limit allowed by the AEDPA," but he "assert[ed] that his failure to file within the limitation is excusable because of an impediment or based on a standard of equitable tolling and, therefore, his petition should be accepted as timely filed." (E.R. 13). Specifically, he claimed that "his failure to file within the limitation period was completely beyond his control because knowledge of the filing requirement was not available to him until the limitation period had passed." (E.R. 13). He contended that, "when the State sent him to Arizona without access to current legal materials, [it] created an impediment to obtaining any knowledge about the limitation period of AEDPA [the Anti-Terrorism and Effective Death Penalty Act]." (E.R. 14). That "impediment was not removed until [Kephart] was returned to Oregon on 07/14/1997[.]" (E.R. 14). He also "assert[ed] that his lack of access to any information related to the AEDPA provides grounds for a late, but timely, filing under the principles of 'equitable tolling,'" and that "the complete impossibility of having knowledge

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[5] Because the Ninth Circuit disposed of this case on the basis of equitable tolling, it did "not address" the issue of statutory tolling. *Roy*, 465 F.3d at 972 n. 3. That issue is not before this Court.

about the procedural requirements of the AEDPA creates 'extraordinary circumstances' sufficient to allow filing." (E.R. 14) (citation omitted).

In his supporting affidavit, Kephart alleged that "[t]hroughout the process of exhausting [his] state appellate and post-conviction remedies, [he had] always planned to seek federal review of any constitutional violations if [he] did not gain relief in state court." (E.R. 17).

> While in Arizona, I had no access to current Oregon or federal law. The CCA [Corrections Corporation of America] library consisted of only three outdated legal books, which contained no information about the AEDPA. The Oregon Department of Corrections (OODOC) [*sic*] made no provision for sending any type of legal updates to the prisoners confined in Arizona. At no time during my imprisonment was there information provided by ODOC or CCA explaining any procedure to obtain legal information relevant to Oregon prisoners.
>
> Because of the insufficiency of the legal materials in the Arizona CCA prison, providing no legal materials which described the AEDPA, and no notice of the AEDPA, I was not able to gain knowledge of the one year limitation period for filing under the Act until I was returned to OSP from Arizona on 07/14/1997, slightly more than two months after I filed my state post-conviction petition.
>
> * * * * *
>
> Based on the preceding facts, I could not have known about the one year filing

> limitation of the AEDPA until I returned to OSP [the Oregon State Penitentiary] on 07/14/1997. At th[at] time, my state post-conviction was active and I could not file a habeas corpus until my state proceedings were exhausted on 10/23/2000. Once my state remedies were exhausted, I filed my habeas corpus petition within the one year limit on 05/14/2001.

(E.R. 17-18). Attached to Kephart's affidavit were materials that included an "inmate communication" dated February 6, 1996, when he was still in a state facility, indicating his desire "to start [his] post-conviction." (E.R. 19).

After counsel was appointed to represent Kephart in the habeas corpus proceeding, his attorney submitted additional materials in support of Kephart's claim of equitable tolling. Among those materials was an affidavit from Noe Martinez, a former inmate who was incarcerated at the Florence, Arizona facility from January 1996 until early October 1997, and who worked as a law library clerk at that facility. (E.R. 155-56). Martinez described inadequacies in the law library, but also asserted that the library "had 28 U.S.C. § 2254, which probably arrived in 1996." (E.R. 156). The library also contained "some edition of *Liebman*'s book on habeas corpus." (E.R. 156). At some point, some information was posted "about the federal one-year statute of limitations * * * regarding habeas corpus petitions." (E.R. 157). Martinez "had some contact with inmate Kephart in the library," but Martinez did not remember any specifics. (E.R. 158).

Another inmate remembered Kephart from the Arizona facility. His recollection was that "Kephart was trying to file his state post conviction and they had nothing in the library to help him." (E.R. 165). This inmate believed that the Arizona prison did not receive section 2254 until shortly before

October 1997. (E.R. 167). He remembered that Kephart "was trying to prepare his state post conviction to file, and he was upset because the library had nothing to help him." (E.R. 167).

In his findings and recommendation, the magistrate judge recommended that the petition seeking relief in habeas corpus be denied and the case dismissed. (E.R. 174). Kephart argued that the time "between the enactment of the AEDPA and the date petitioner filed his post-conviction petition should be equitably tolled because the State of Oregon interfered with his ability to file his post-conviction any sooner by sending him to a private prison in Florence, Arizona which had an inadequate law library." (E.R. 172). But the magistrate judge concluded that "did not prevent [Kephart] from filing his state post-conviction petition." (E.R. 173). Kephart "ha[d] failed to demonstrate that equitable tolling is warranted in this case." (E.R. 173) (citation omitted). "[A]n evidentiary hearing [wa]s not warranted in this case because there is adequate information in the record." (E.R. 173).

On *de novo* review of the findings and recommendation, the district court judge agreed "that equitable tolling is not appropriate." (E.R. 177). Kephart "present[ed] no evidence that he faced such [extraordinary] circumstances." He made "conclusory allegations that he had no access to current Oregon or federal law, and that the library at the corrections facility in Arizona had only three outdated books." (E.R. 177). Kephart did "not indicate that he asked library personnel or assistance [*sic*] for help, or that when he asked for assistance none was provided." (E.R. 177). Moreover, Kephart's account was "contradicted by the affidavit of Noe Martinez." (E.R. 177). Martinez stated that 28 U.S.C. § 2254 was available in 1996 and that information about the one-year statute of limitations was posted. (E.R. 178). Furthermore, petitioner did not provide the dates on which he attempted to obtain

information at the Arizona facility. (E.R. 178). It appeared that Kephart "believed his federal § 2254 petition would be timely if filed within one year of the date on which the denial of his post-conviction petition became final. Such belief was not necessarily unreasonable, but it was incorrect." (E.R. 179).

b. Ninth Circuit

On appeal, the Ninth Circuit reversed and remanded for an evidentiary hearing on equitable tolling. *Roy,* 465 F.3d at 975. The court noted that it "has recognized that the AEDPA statute of limitations provisions * * * can be subject to equitable tolling." *Id.* at 969, citing *Calderon v. United States Dist. Court (Beeler),* 128 F.3d 1283, 1288 (9th Cir. 1997), *cert. denied* 522 U.S. 1099 (1998), *overruled on other grounds by Calderon v. United States Dist. Court (Kelly),* 163 F.3d 530 (9th Cir. 1998) (en banc), *cert. denied* 526 U.S. 1060 (1999). In this case, the Ninth Circuit outlined the requirements for equitable tolling, but noted that the court's "precedents do not provide us much guidance regarding what diligence might mean in the AEDPA context." *Id.* at 970 (footnote omitted).

As to both Kephart and Roy, their habeas petitions were timely filed under AEDPA only if the time while they were in Arizona was equitably tolled. *Id.* at 968. Ultimately, as to Kephart (and Roy) the court determined that because they had "filed their habeas petitions *pro se*, allege[d] specific efforts they pursued in order to file habeas petitions, and because both filed their claims within a reasonable period of time after they were transferred back to the Oregon facility and the extraordinary circumstances were removed," the court concluded that they had "presented sufficient evidence of their diligence to warrant an evidentiary hearing." *Id.* It was "highly relevant" that both petitioners "were proceeding *pro se* until appointed counsel by the district court." *Id.* Because

they "were proceeding *pro se,* [the court] construe[d] their allegations regarding diligence liberally." *Id.*

With regard to Kephart, he

> presented evidence of his efforts to file his claim while in Arizona. One of the affidavits in this case indicates that "Kephart was trying to file his state post conviction" claim and thus was present in the law library trying to do research. The fact that Kephart was able to discuss with specificity what precisely was present in the Arizona library also indicates he had visited the library at least on occasion. Kephart stated that the Arizona library "consisted of only three outdated legal books, which contained no information about the AEDPA."

Id. at 971. Kephart (and Roy) had "done enough to demonstrate that they were not the cause of their tardiness, and that they would have filed on time but for the transfer to Arizona." *Id.* at 973. They were entitled to an evidentiary hearing because of significant conflicts in the affidavits on material issues. *Id.* at 975.[6]

REASONS FOR GRANTING THE WRIT

The central issues in this case are whether equitable tolling is available at all in the AEDPA context and, if equitable tolling is available, how specific a petitioner's habeas pleadings and evidentiary submissions must be in order to obtain an evidentiary hearing on equitable tolling.

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[6] In this petition, the State has not described the affidavits it submitted regarding the legal materials and the assistance that was available to Oregon inmates in the Arizona facility.

With regard to those issues, the Ninth Circuit made at least four significant legal errors that will impact habeas corpus practice in the circuit, that will adversely affect the States in the circuit, and that will lead to many unnecessary and, for the States, time-consuming and expensive evidentiary hearings. The court ignored reality when it chose to treat a long-represented habeas petitioner as though the petitioner still was proceeding *pro se*. It relied on its own earlier decisions in holding that the AEDPA statute of limitations is subject to equitable tolling. It set the bar much too low for obtaining an evidentiary hearing on equitable tolling. And it diluted the diligence requirement of equitable tolling to such a degree as to render the requirement almost meaningless. The Ninth Circuit's decision conflicts with decisions from other circuits, and it will confuse and distort habeas practice in the circuit. This Court's review and guidance is needed.

I. The Ninth Circuit erred in treating a represented habeas petitioner as a *pro se* petitioner; that error could impact habeas cases throughout the circuit.

Curiously, although Kephart was appointed counsel in the habeas proceeding in December 2001 – about seven months after he filed his habeas petition and about two and a half years before the district court judgment was entered – although counsel was allowed to and did submit additional evidentiary materials in support of Kephart's equitable tolling claim, and although the district court considered those additional materials when it decided not to hold an evidentiary hearing and to deny the petition, the Ninth Circuit still treated Kephart's habeas pleadings and evidentiary submissions and as though he was proceeding *pro se*. It was "highly relevant" that Kephart was "proceeding *pro se*" until counsel was appointed. *Roy*, 465 F.3d at 970. Because he was "proceeding *pro se*, [the court] contrue[d] [his] allegations regarding diligence liberally." *Id.*

> [E]ven though *pro se* status alone is not enough to warrant equitable tolling, it informs and colors the lens through which we view the filings, and whether those filings made sufficient allegations of diligence. *See Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990) ("This court recognizes that it has a duty to ensure that *pro se* litigators do not lose their right to a hearing on the merits of their claim due to ignorance of technical procedural requirements").

Id.

Simply put, it makes no sense and ignores reality to continue to treat a represented habeas petitioner as a *pro se* when the petitioner has long had the assistance of appointed counsel who was able to and did supplement the record. Of course, Kephart was proceeding *pro se* when he filed his habeas petition in this case and when he filed his response to the district court's order to show cause why his petition should not be dismissed as untimely. But petitioner had been represented for about two and a half years when the district court's judgment issued. Nothing prevented his attorney from submitting additional affidavits and other materials regarding the equitable tolling claim; indeed he did so, and the district court considered those materials when it ruled on the claim. In this situation it is anomalous to continue to treat Kephart as though he is proceeding *pro se*.

And the error is one that can significantly and adversely impact habeas corpus practice throughout the Ninth Circuit. It is routine for habeas petitioners to file their initial petition *pro se*, and counsel often is appointed thereafter. Thus, the situation that occurred in this case is a common one. Under the court's once-a-*pro-se*-always-a-*pro-se* approach, habeas petitioners get the best of all possible worlds – the

appointment of counsel along with the lenity afforded the pleadings of *pro se* petitioners – while the States get the worst. While attempting to uphold state court convictions, the States must face opposing counsel, but can never know which pleadings or affidavits the court may treat as *pro se*, even some considerable time after counsel has been appointed. Such an approach can only add a Byzantine layer of confusion and uncertainty to habeas practice in the circuit and lead to anomalous results, such as the one in this case, in which a long-represented petitioner is transmuted back into someone proceeding *pro se*. So far as the State has been able to determine, no other federal court has taken the approach that the Ninth Circuit took in this case. The court's approach conflicts with the one this Court has taken. *See Baldwin Co. Welcome Center v. Brown*, 466 U.S. 147, 150 n. 4 (1984) (rejecting the dissent's suggestion that the Court should have been more solicitous of *pro se* pleadings in a case where the petitioner was represented by counsel when the district court dismissed the case and thereafter).

II. The Ninth Circuit erred in holding that equitable tolling is available to excuse the otherwise untimely filing of a section 2254 habeas petition.

In this case, the Ninth Circuit, relying in part on its earlier en banc decision in *Calderon v. United States Dist. Court (Kelly)*, 163 F.3d at 535, noted that the court "has recognized that the AEDPA statute of limitations provisions violated by Roy and Kephart can be subject to equitable tolling." *Roy*, 465 F.3d at 969. The court erred in holding that equitable tolling is available in the AEDPA context to excuse the filing of otherwise untimely petitions.[7]

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[7] Admittedly, petitioner did not raise this claim below. But to do so would have been futile. The Ninth Circuit repeatedly

This Court has "never squarely addressed the question whether equitable tolling is applicable to AEDPA's statute of limitations." *Pace v. DiGuglielmo,* 544 U.S. 408, at 418 n. 8 (2005). In *Pace,* the Court merely "assume[d] without deciding its application for purposes of th[at] case." *Id. Cf. Duncan v. Walker,* 533 U.S. 167, 182-84 (2001) (Stevens, J., concurring, in part, joined by Souter, J.) (nothing in that case, "nor anything in the text or legislative history of AEDPA, precludes a federal court from deeming the limitations period tolled for such a petition as a matter of equity").

Concededly, most courts that have considered the issue have ruled that the one-year limitations period in §§ 2244 and 2255 is subject to equitable tolling. *See Williams v. Sims,* 390 F.3d 958, 962 (7th Cir. 2004) (collecting cases). Those decisions, however, have not given sufficient attention to the statutory text of those provisions and to the fact that, in section 2244 in particular, Congress explicitly prescribed the circumstances in which the one-year limitations period can be extended or tolled. Opinions that have reached or have suggested the opposite conclusion – and that have determined that equitable tolling is not or may not be available at all in the AEDPA context – have given more attention to the statutory text. *See Solomon v. United States*, 467 F.3d 928, 936 (6th Cir. 2006) (Griffin, J., dissenting) (emphasizing the paramount significance of the statutory text, and indicating that the detailed and specific text of section 2255 does not suggest any Congressional intent to allow for equitable tolling); *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999) (given the express tolling provisions of 28 U.S.C. § 2244(d), "it is unclear what room remains for importing the judge-made doctrine of equitable tolling"); *David v. Hall,* 318 F.3d

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has embraced the concept of equitable tolling in the AEDPA setting, including in its en banc decision in *Kelly*.

343, 346 (1st Cir.), *cert. denied* 540 U.S. 815 (2003) (noting that section 2244(d) defines the one-year limitations period "in detail" and that it "adopt[s] very specific exceptions;" "Congress likely did not conceive that the court would add new exceptions and it is even more doubtful that it would have approved of such an effort;" "AEDPA reflects Congress' view that the courts were being too generous with habeas relief and that the whole system needed to be tightened up;" but assuming *arguendo* that equitable tolling can be available) (citations omitted); *United States v. Pollard*, 161 F. Supp. 2d 1, 12 (D DC 2001) ("The intent of Congress to prevent equitable tolling is indicated by the specific provisions in § 2255 to control the statute of limitations"); *Giles v. United States*, 6 F. Supp. 2d 648, 650 (ED Mich 1998) ("The detail of § 2255 and its direct and express determination of when the time limit begins indicates that Congress did not intend to permit courts to read other unmentioned and open-ended equitable exceptions into the statute") (citation omitted). This Court should grant certiorari to resolve the conflicting views about whether equitable tolling is available under the AEDPA to excuse the otherwise untimely filing of habeas petitions. That issue is extremely important to States, to habeas petitioners, and to the lower federal courts.

This Court also should review this issue because the decision of the Ninth Circuit (and of the other courts that have held that equitable tolling is available in this context) appear to be in tension with recent decisions of this Court holding that equitable tolling is not available when Congress has crafted a plain, specific, and detailed statute of limitations. In *United States v. Brockamp*, 519 U.S. 347 (1997), this Court unanimously rejected the invitation to rewrite "for nonstatutory equitable reasons" a statute of limitations enacted by Congress for the filing of tax returns. The Court held that the statute's detail and its "explicit listing of

exceptions" indicated that "Congress did not intend courts to read other unmentioned, open-ended, 'equitable' exceptions into the statute that it wrote." *Brockamp,* 519 U.S. at 352. Similarly, a year later in *United States v. Beggerly*, 524 U.S. 38, 48 (1998), this Court reiterated that "[e]quitable tolling is not permissible when it is inconsistent with the text of the relevant statute." That teaching appears to have been largely forgotten when the issue has been whether equitable tolling is consistent with the text of the AEDPA. *But see Solomon,* 467 F.3d at 937-39 (Griffin, J., dissenting, relying on the Court's decisions in *Brockamp* and *Beggerly* to conclude that equitable tolling should not be available under section 2255).

III. Assuming that equitable tolling is available, the Ninth Circuit set the bar for obtaining an evidentiary hearing far too low; its approach conflicts with that of other circuits.

Based on the most conclusory of allegations, the Ninth Circuit held that Kephart is entitled to an evidentiary hearing on his claim of equitable tolling, and specifically on his claim that he diligently pursued his rights while incarcerated in Arizona. It is enough, the court determined, that Kephart stated that he was trying to file a state post-conviction petition and "thus was present in the law library trying to do research." *Roy,* 465 F.3d at 971. That he was able to describe the materials that were in the Arizona law library "also indicates he had visited the library at least on occasion." *Id.*

If that is a showing of diligence sufficient to warrant an evidentiary hearing, virtually any prisoner advancing an equitable tolling claim, who makes the most minimal showing, will be entitled to an evidentiary hearing. Such a result will waste district court time, and subject the States in the circuit to many unnecessary evidentiary hearings.

The Ninth Circuit's approach also is at odds with that adopted by other circuits. The Eleventh Circuit has held that an evidentiary hearing need not be held on a claim of equitable tolling "'when [a habeas petitioner's] claims are merely conclusory allegations unsupported by specifics.'" *Pugh v. Smith*, 465 F.3d 1295 (11th Cir. 2006), quoting *Drew v. Dep't of Corrections*, 297 F.3d 1278, 1293 n. 7 (11th Cir. 2002), *cert. denied* 537 U.S. 1237 (2003), in turn quoting *Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991), *cert. denied* 502 U.S. 1105 (1992). *See also Drew*, 297 F.3d at 1293 ("In light of the wholly conclusory nature of Drew's recently-presented allegations and in the absence of supporting evidence, the district court did not abuse its discretion in deciding not to hold a hearing"). Similarly, the Seventh Circuit has stated that an evidentiary hearing is not required "when a petitioner's allegations are 'vague, conclusory, or palpably incredible rather than detailed and specific.'" *Kato v. United States*, 467 F.3d 1063, 2006 U.S. App. LEXIS 27262, **8 (7th Cir. 2006), quoting *Bruce v. United States*, 256 F.3d 592, 597 (7th Cir. 2001) (internal citations and internal quotation marks omitted in *Kato*).[8]

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[8] In addition to disagreeing about the standard that applies when deciding whether to grant an evidentiary hearing, the courts of appeals disagree about the standard of review that applies to such a decision. *See, e.g., Rouse v. Lee*, 339 F.3d 238, 247 & n. 7-9 (4th Cir. 2003) (en banc), *cert. denied* 541 U.S. 905 (2004) ("The other circuits are divided on the proper standard of review, with some applying abuse of discretion and others applying de novo review. Several circuits provide for de novo review in certain circumstances, and abuse of discretion review in all other circumstances") (footnotes omitted). In this case, the Ninth Circuit purported to apply an abuse of discretion standard, *Roy*, 465 F.3d at 968, although it

The Ninth Circuit's approach in this case stands in stark contrast to the approach of the Eleventh and Seventh Circuits. It is difficult to envision a claim much more conclusory than Kephart's. From his submissions the reader knows only that he asserts he was in the prison law library on occasion and that there wasn't much in the library. There is nothing to show he was attempting to pursue federal habeas, asked about federal materials, or otherwise attempted to learn about the requirements of federal law.

In addition to the direct conflict with the Eleventh and Seventh Circuits, the Ninth Circuit's ready willingness to order an evidentiary hearing based on mere conclusory allegations conflicts with the case law of other circuits as well. In *LaCava v. Kyler,* 398 F.3d 271, 277 (3rd Cir 2005), the court indicated that an evidentiary hearing on equitable tolling is not warranted if the petitioner fails to show that he exercised reasonable diligence in attempting to file a timely petition. *See also Robinson v. Johnson,* 313 F.3d 128, 142 (3rd Cir. 2002), *cert. denied.*540 U.S. 826 (2003) (evidentiary hearing need not be held in every case in which the petitioner claims he was deprived of access to his legal materials; no hearing required when the deprivation was relatively brief, petitioner said he needed the materials for state court filings, and ultimately he filed federal habeas without them).[9]

In contrast, Kephart has not shown that he was diligent. Indeed, he has come nowhere near such a showing. The

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is difficult to discern any appellate court deference to the district court's exercise of discretion.

[9] Kephart appears to have visited the law library because he was working on his state post-conviction petition, which he filed while still incarcerated in Arizona.

Second Circuit also has noted that, even when a habeas petitioner's allegations are adequate to survive a motion to dismiss, an evidentiary hearing is not the inevitable result; instead, the record may be supplemented. *Valverde v. Stinson*, 224 F.3d 129, 135 (2nd Cir. 2000). As discussed above, Kephart, while represented by counsel, already has had an adequate opportunity to supplement the record, and his attorney submitted additional affidavits.

In sum, the Ninth Circuit has set the bar that must be cleared to gain an evidentiary hearing almost at ground level. The most conclusory of allegations, that do not show reasonable diligence, will suffice. That approach conflicts with those employed in other circuits, which will not order an evidentiary hearing based on conclusory allegations and demand more from a habeas petitioner. The Ninth Circuit's approach will waste considerable trial court time and consume scare judicial resources. It will force the States of the circuit into unnecessary evidentiary hearings in many cases. The availability of an evidentiary hearing on equitable tolling should not vary widely from circuit to circuit. To ensure some uniformity of federal practice, this Court's intervention and guidance is needed.

IV. The Ninth Circuit diluted the diligence component of an equitable tolling claim; its approach conflicts with that of other circuits.

This Court has held that, "[g]enerally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way. " *Pace v. DiGuglielmo*, 544 U.S. at 418, citing *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990).[10] In

[10] As noted above, in *Pace* this Court assumed that equitable tolling applied. 544 U.S. at 418 n. 8.

this case, the Ninth Circuit held that Kephart was entitled to an evidentiary hearing because he had made an adequate showing of both his diligence and of extraordinary circumstances. At least for present purposes, the State does not challenge the court's decision about the existence of extraordinary circumstances. The court's ruling as to diligence, however, so reduces that requirement that it becomes almost meaningless. The Ninth Circuit's threshold is set much lower than that set by other courts of appeals.

As discussed above, the Ninth Circuit held that the district court abused its discretion in denying Kephart an evidentiary hearing on equitable tolling, and specifically on the issue of his diligence, based on the sketchiest of showings. According to the Ninth Circuit, Kephart provided enough evidence of his diligence by stating that he was trying to file a state post-conviction petition while incarcerated in Arizona, and "thus was present in the law library trying to do research." *Roy,* 465 F.3d at 971. In addition, the fact that he "was able to discuss with specificity what precisely was present in the Arizona law library * * indicates that he had visited the library at least on occasion." *Id.* Kephart asserted that the law library had only three outdated legal books, none of which contained any information about the AEDPA. *Id.*

If that meager showing is enough to obtain an evidentiary hearing on diligence, diligence equates to something approaching passivity. If diligence can amount to visiting the law library on occasion, knowing what is in it, and trying to do research (for a state court case), diligence amounts to very little. Kephart's allegations and his later submissions do not show that he wanted to know what the AEDPA time limit was, that he asked anyone for information about that time limit or about AEDPA generally, that he visited the law library more than "on occasion," or what he did there. That is

not a showing of diligence.[11] The Ninth Circuit noted that, before its decision in this case, that court's "precedents [did] not provide * * * much guidance regarding what diligence might mean in the AEDPA context." *Id.* at 970 (footnote omitted). But Ninth Circuit precedent now provides that guidance, and the "guidance" points in the wrong direction. Diligence has been converted into minimally tepid effort. That approach conflicts with the more demanding standard set by other courts of appeals.

In cases involving claims of inadequate prison law libraries or lack of access to legal materials, other federal appellate courts have required much more of a showing of diligence than the Ninth Circuit accepted here. In *Arthur v. Allen,* 452 F.3d 1234, *modified* 459 F.3d 1310 (11th Cir. 2006), *pet. cert. pending,* the prisoner claimed that inadequacies in the prison law library had prevented him from filing and entitled him to equitable tolling. The court rejected the claim, holding that,

> To show diligence, a petitioner claiming deficiencies in the prison law library must provide details of the specific actions taken toward filing the petition. *Helton* [*v. Secretary for the Dep't. of Corr.*], 259 F.3d [1310,] at 1314 [(11th Cir. 2000)]. He must show "when

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[11] Because Kephart's allegations also do not show that the absence of AEDPA materials prevented him from filing a federal habeas claim earlier, he also has failed to show any causal relationship between the lack of AEDPA materials and his failure to file within the AEDPA time limit. The focus of the State's briefing in this case has been on diligence, however, not on lack of causation, and this petition will retain that focus.

> he found out about the library's alleged deficiency," must "state any independent efforts he made to determine when the relevant limitations period began to run," and must demonstrate how the prison "thwarted his efforts." *Id.*

Arthur v. Allen, 452 F.3d at 1253. *See also Helton v. Secretary for the Dep't. of Corr.*, 259 F.3d 1310, 1314 (11th Cir. 2000), *rehrg denied* 275 F.3d 49 (2001), *cert. denied* 535 U.S. 1080 (2002) (petitioner's "declaration lacks the necessary specificity to show when he found out about the library's alleged deficiency and what – if anything – he did to remedy the defect;" petitioner never asserts that he asked for the amendments to the federal habeas corpus statutes, or that he made any independent efforts to determine the limitations period).

The Tenth Circuit used a similar approach in *Miller v. Marr*, 141 F.3d 976 (10th Cir.), *cert. den.* 525 U.S. 891 (1998). In that case, as in this one, the petitioner had been transferred from a state institution to a private institution out of state. He claimed that due to inadequacies in the law library at the privately-run facility he did not learn of the AEDPA time limitation until he returned to the state-run prison. *Miller*, 141 F.3d at 978. The court rejected the petitioner's equitable tolling claim because he

> has provided no specificity regarding the alleged lack of access and the steps he took to diligently pursue his federal claims. *Cf. Lewis v. Casey*, 518 U.S. 343 (1996). It is not enough to say that the Minnesota facility lacked all relevant statutes and case law or that the procedure to request specific materials was inadequate.

Id.[12]

In *Felder v. Johnson,* 204 F.3d 168 (5th Cir.), *cert. den.* 531 U.S. 1035 (2000), the court took a much more categorical approach than the one used by the Tenth and Eleventh Circuits. In *Felder,* the petitioner claimed that deficiencies in the prison law library meant that he was not aware of the AEDPA time limitation. 204 F.3d at 169 & n. 1. The court held that such a claim could not warrant equitable tolling because "mere ignorance of the law or lack of knowledge of filing deadlines does not justify equitable tolling or other exceptions to a law's requirements." *Id.* at 172 (numerous citations omitted).[13]

Thus, the case law shows that federal appellate courts take at least three disparate approaches to claims of equitable tolling in federal habeas corpus that are based on allegations of inadequacies in prison law libraries and lack of access to legal materials. Specifically with regard to the showing of diligence that is required for such a claim, the three approaches are: (1) the Ninth Circuit's approach that equates

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[12] In *Miller,* the court also noted that the claimed inadequacies in the law library did not explain the petitioner's "lack of pursuit of his federal claims" earlier, before his transfer. *Id.* Similarly, Kephart's claims do not explain why he waited months to file his federal petition after he returned to Oregon.

[13] The *Felder* court also suggested that a court "should not toll unless the circumstances presented in a particular case are on a par with the conditions listed in [28 U.S.C.] § 2244(d). None of Felder's circumstances, and particularly not his ignorance of the law, can be said to be on a par with those conditions." *Id.* at 172-73.

minimal effort with diligence; (2) the approach used by the Tenth and Eleventh Circuits, that requires more effort and more specificity about the extent of that effort; and (3) the Fifth Circuit's approach that treats claims of inadequacies in a law library as claims based on ignorance of the law, and rejects them on that basis.[14] Those approaches are inconsistent and irreconcilable. Their existence subjects States (and federal habeas petitioners) to conflicting outcomes depending on the happenstance of which circuit has jurisdiction over a federal habeas case. Such a patchwork result should not be tolerated in an area of the law as significant, and as frequently litigated, as federal habeas corpus. This Court should accept certiorari and resolve this conflict among the circuits.

CONCLUSION

For the reasons discussed above, petitioner respectfully requests that this Court grant the petition for certiorari and reverse the decision of the court below.

Respectfully submitted,

HARDY MYERS
Attorney General of Oregon
PETER SHEPHERD
Deputy Attorney General
MARY H. WILLIAMS
Solicitor General
JANET A. METCALF
Assistant Attorney General
Counsel for Petitioners

January 22, 2007

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[14] Admittedly, and perhaps inconsistently, the Fifth Circuit will consider such claims under the rubric of statutory tolling, at least in some circumstances. *Egerton v. Cockrell*, 334 F.3d 433, 437 (5th Cir. 2003).

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF OREGON

PHILLIP L. KEPHART, Civil No. 01-690-CO

Petitioner,

vs.

STANLEY CZERNIAK,

Respondent. FINDINGS AND RECOMMENDATION

COONEY, Magistrate Judge.

Petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 challenging his conviction in Lane County Circuit Court Case Nos. 10-91-02674 and 10-91-03155. The petition contains four grounds for relief. Respondent argues that petitioner did not file his habeas corpus petition within the time allowed by 28 U.S.C. § 2244. For the reasons set forth below, petitioner's petition should be denied and this proceeding should be dismissed.

BACKGROUND

Petitioner was convicted of four counts of Assault in the Second Degree, Assault in the First Degree, Attempted Assault in the First Degree, and two counts of Criminal Mistreatment in the First Degree. (Exhibit 101). Petitioner directly appealed his convictions to the Oregon Court of Appeals. The Oregon Court of Appeals affirmed his convictions.

The Oregon Supreme Court allowed petitioner's petition for review and concluded that his claims could be reviewed under ORS 138.222(2)(d). The Oregon Supreme Court

remanded the case to the Oregon Court of Appeals. State v. Kephart, 320 Or. 433 (1994).

On remand, the Oregon Court of Appeals affirmed the judgments, finding that petitioner failed to preserve the claim of error he asserted on appeal. State v. Kephart, 137 Or. App. 277 (1995). The appellate judgment is dated December 8, 1995. (Exhibit 102). Petitioner did not seek review by the Oregon Supreme Court or the United States Supreme Court.

On May 6, 1997, petitioner filed a petition for post-conviction relief in Marion County Circuit Court Case No. 97C-1155. (Exhibits 103-104). On October 5, 1998, the post-conviction court denied relief. (Exhibit 105). Petitioner appealed, but the Oregon Court of Appeals affirmed without opinion in Kephart v. Thompson, 166 Or App. 238 (2000). The appellate judgment is dated October 23, 2000. (Exhibit 106). The Oregon Supreme Court denied review. 330 Or. 553 (2000).

DISCUSSION

This petition was filed on May 14, 2001. Therefore, the provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA) govern this case. The AEDPA imposes a one-year statute of limitations on the filing of federal habeas corpus petitions by state prisoners. 28 U.S.C. § 2244(d)(1). The one-year statute of limitations begins to run from the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is

> removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence. 28 U.S.C. § 2244(d)(1)(A-D).

The AEDPA provides that the statute of limitations is tolled during the time that a state prisoner is attempting to exhaust his claims in state court. Nino v. Galaza, 183 F.3d 1003, 1005 (9th Cir. 1999), cert. denied, 529 U.S. 1104 (2000) (citing 28 U.S.C. § 2244 (d) (2)). In addition, the "statute of limitations is tolled for all of the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies with regard to a particular post-conviction application." Id. at 1006 (citation omitted). However, the "AEDPA's statute of limitations is not tolled from the time a final decision is issued on direct state appeal and the time the first state collateral challenge is filed because there is no case 'pending' during that interval." Id.

In this case, petitioner's direct appeal was final on December 8, 1995 (Exhibit 102). Petitioner had 90 days in which to seek certiorari from the U.S. Supreme Court. Bowen v. Roe, 188 F.3d 1157 (9th Cir. 1999). The date of the final disposition of petitioner's direct appeal for AEDPA statute of limitation purposes was March 7, 1996.

This is before the effective date of the AEDPA. Therefore, the statute of limitations began to run on April 24, 1996, the day the AEDPA took effect. See Nino, 183 F.3d at 1006.

Petitioner had one year from April 24, 1996 to file his habeas corpus petition. Petitioner filed his petition for post-conviction relief on May 6, 1997. (Exhibit 104), The AEDPA's statute of limitations is not tolled "from the time a final decision on direct state appeal and the time the first state collateral challenge is final because there is no case 'pending' during the interval." Nino, 183 F.3d at 1006. The AEDPA's one year statute of limitations ran before petitioner filed his petition for post-conviction relief.

Absent equitable tolling, petitioner's petition is untimely. To be entitled to equitable tolling, a petition must demonstrate extraordinary circumstances beyond the petitioner's control that made it impossible to file a timely petition. Allen v. Lewis, 255 F.3d 798, 799-800 (9th Cir. 2001), rehearing en banc granted, 278 F.3d 1357 (9th Cir. 2002).

Petitioner argues that the 377 days between the enactment of the AEDPA and the date petitioner filed his post-conviction petition should be equitably tolled because the State of Oregon interfered with his ability to file his post-conviction petition any sooner by sending him to a private prison in Florence, Arizona which had an inadequate law library. Petitioner claims that while in Arizona: he had no access to current Oregon or federal law; there were no provisions for sending any legal updates to prisoners confined in Arizona; there was no information explaining the procedure to obtain legal information relevant to Oregon prisoners; there were no legal materials which described the AEDPA; no notice of the AEDPA; and he was not able to gain knowledge of the AEDPA's limitations period. (Docket #8 – Petitioner's Response to OSC). Petitioner has also submitted affidavits of other Oregon prisoners housed in the Florence, Arizona

facility that incurred similar difficulties. (Docket #34 – Petitioner's Brief in Support Exhibits 3-5).

The Respondent has submitted Exhibit #107 – affidavit of Trent Axen, Exhibit 108 – affidavit of David Spencer, Exhibit #109 – affidavit of Sherrill Gautreaux, and Exhibit 110 – Supplemental affidavit of Trent Axen which contradict petitioner's evidence and demonstrates that Oregon legal materials and services, as well as information regarding the AEDPA's statute of limitations, was available to inmates in the Florence, Arizona facility. Therefore, the State of Oregon did not prevent petitioner from filing his state post-conviction petition.

Petitioner has failed to demonstrate that equitable tolling in warranted in this case. See Patton v. Lampert, 00-1184-AA (D.Or.) Order dated May 14, 2002). The court finds that an evidentiary hearing is not warranted in this case because there is adequate information in the record.

Petitioner argues that the fact that he didn't know where to file his post-conviction petition constitutes extraordinary circumstances which warrant equitable tolling. The Supplemental affidavit of Trent Axen demonstrates that information regarding where to file a post-conviction petition was available to petitioner. (Respondent's Exhibit #110 Attachment #6). Therefore, equitable tolling is not appropriate under the circumstances.

In the alternative, petitioner argues that the court should toll the limitations period during the two-year period that Oregon allows for prisoners to file state post conviction petitions because failure to do so results in an indirect suspension of the writ of habeas corpus. The Ninth Circuit has rejected the argument that the AEDPA's one-year statute of limitations unconstitutionally suspended the writ of habeas corpus in light of the fact that it is not jurisdictional and is

subject to equitable tolling. Ferguson v. Palmateer, 321 F.3d 820 (9 th Cir.), cert. denied, 2003 WL 21928909; Green v. White, 223 F.3d 1001, 1003 (9th Cir. 2000).

RECOMMENDATION

Based on the foregoing, it is recommended that petitioner's petition (#2) be denied, and this case be dismissed.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. **Any notice of appeal pursuant to Rule 4 (a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order.** ***The parties shall have ten days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. Thereafter, the parties have ten days within which to file a response to the objections.*** **Failure to timely file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation.**

DATED this 6th day of November, 2003.

/s/ John P. Cooney
John P. Cooney
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

PHILLIP L. KEPHART, Civ. No. 01-690-CO

Petitioner,

vs.

STANLEY CZERNIAK, ORDER

Respondent.

Aiken, Judge:

Magistrate Judge Cooney issued Findings and Recommendation in this case on November 6, 2003. Magistrate Judge Cooney recommends that the petition for writ of habeas corpus be denied and the case be dismissed. Magistrate Judge Cooney found that petitioner's claims were brought after the one-year statute of limitations period under the Anti-Terrorism and Effective Death Penalty Act (AEDPA), and that the circumstances did not warrant the application of equitable tolling. 28 U.S.C. § 2244(d)(1). The matter is now before me. See 28 U.S.C. § 636 (b)(1)(B) and Fed. R. Civ. P. 72(b).

When either party objects to any portion of a magistrate judge's Findings and Recommendation, the district court must make a de novo determination of that portion of the magistrate judge's report. See 28 U.S.C. § 636(b)(1); McDonnell Douglas Corp. v. Commodore Business Machines, Inc., 656 F.2d 1309, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982). After being granted extensions of time in which to respond, petitioner has filed timely objections to the Findings and Recommendation. I have, therefore, given de novo review of Judge Cooney's rulings.

I agree that the petition was filed after the applicable limitations period and that equitable tolling is not appropriate. Equitable tolling under the AEDPA is appropriate "only if extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time." Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999) (internal citations omitted). Petitioner presents no evidence that he faced such circumstances. Petitioner makes conclusory allegations that he had no access to current Oregon or Federal law, and that the library at the corrections facility in Arizona had only three outdated books. See affidavit of Phillip Kephart, p. 2 (attached to response to order to show cause). However, petitioner does not indicate that he asked library personnel or assistance for help, or that when he asked for assistance none was provided. Petitioner's account is contradicted by the affidavit of Noe Martinez. Martinez stated that although materials were sometimes difficult to obtain, a library handbook was available in the library and an attorney came to the library and assisted inmates in obtaining copies of federal cases. Martinez states that sometimes a request for copies of cases from Oregon State Penitentiary would go unheeded; however, petitioner here does not state that he requested cases or any other type of assistance and was refused. Moreover, Martinez states that inmates had access to a copy of 28 U.S.C. § 2254 in 1996, and that information regarding the one-year statute of limitations was posted and that they were informed generally that the limitations would not run while inmates were litigating their state post-conviction petitions. See Affidavit of Noe Martinez, pp. 2-3.

Furthermore, petitioner does not provide the dates on which he attempted to obtain information at the Arizona facility. Such an omission is critical where petitioner did not file his § 2254 federal petition until 203 days after his post-conviction proceeding was final. Therefore, in order to find

that equitable tolling applied, the court must find that, absent deficient legal materials, petitioner likely would have filed his state post-conviction petition within 162 days from when the statute of limitations started to run on April 24, 1996, on or about October 4, 1996. However, petitioner presents no evidence to allow the court to make such a finding with any reliability. Petitioner offers evidence that he sought library access in February 1996, shortly before he was transferred to Arizona. Petitioner also offers a letter from public defender informing petitioner that he had two years from December 8, 1995 in which to file a petition for post-conviction relief in state court. That letter is dated February 11, 1997, well beyond October 1996. Instead, it appears that petitioner believed his federal § 2254 petition would be timely if filed within one year of the date on which the denial of his post-conviction petition became final. Such belief was not necessarily unreasonable, but it was incorrect.

THEREFORE, IT IS HEREBY ORDERED that Magistrate Judge Cooney's Findings and Recommendation (doc. 55) filed November 6, 2003, is ADOPTED. The Petition for Writ of Habeas Corpus (doc. 2) is DENIED, and this case is DISMISSED.

IT IS SO ORDERED.

DATED this 9th day of June, 2004.

/s/ Ann Aiken
Ann Aiken
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF OREGON

PHILLIP L. KEPHART,

Petitioner,

v.

Civ. No. 01-690-CO

STANLEY CZERNIAK,

Respondent.

JUDGMENT

This action is dismissed.

Dated: June 10, 2004.

Donald M. Cinnamond, Clerk

by /s/ Leslie Engdall

Leslie Engdall, Deputy

JUDGMENT **DOCUMENT NO: _____**

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF OREGON

PHILLIP L. KEPHART,

Petitioner,

vs.

STANLEY CZERNIAK,

Respondent.

Civ. No. 01-690-CO

DENIAL OF CERTIFICATE OF APPEALABILITY

Pursuant to petitioner's filing of a notice of appeal in this case, the court certifies that the petitioner has not made a substantial showing of the denial of a constitutional right pursuant to 28 USC § 2253(c)(2). This cause is not appropriate for appellate review.

DATED this 7t h day of July, 2004.

/s/ Ann Aiken
Ann Aiken
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALBERT ROY,

Petitioner-Appellant,

v.

ROBERT O. LAMPERT,

Respondent-Appellee.

No. 04-35514

D.C. No. CV-01-00861-CO
Oregon
(Medford)

ORDER

PHILLIP L. KEPHART,

Petitioner-Appellant,

v.

STAN CZERNIAK, Superintendent,

Respondent-Appellee.

No 04-35626

D.C. No. CV-01-00690-CO
Oregon
(Medford)

Before: KOZINSKI and LEAVY, Circuit Judges.

The court sua sponte consolidates these two appeals. The request for a certificate of appealability is granted with respect to the following issue: whether the district court properly denied appellant's federal habeas corpus petition as untimely and denied equitable tolling without an evidentiary hearing, despite conflicting affidavits on a factual issue. *See* 28 U.S.C. §§ 2244(d), 2253(c)(2).

The consolidated briefing schedule is set as follows: appellant's opening brief is due May 16, 2005; appellee's

answering brief is due June 20, 2005; and the optional reply brief is due within 14 days after service of the answering brief.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALBERT ROY,

Petitioner-Appellant,

v.

ROBERT O. LAMPERT,

Respondent-Appellee.

No. 04-35514

D.C. No. CV-01-00861-CO

PHILLIP L. KEPHART,

Petitioner-Appellant,

v.

STAN CZERNIAK, Superintendent, OSP,

Respondent-Appellee.

No. 04-35626

D.C. No. CV-01-00690-CO

OPINION

Appeal from the United States District Court
for the District of Oregon

John P. Cooney, Magistrate Judge, Presiding

Argued and Submitted
December 5, 2005—Portland, Oregon

Filed July 12, 2006

Before: James R. Browning, Dorothy W. Nelson, and Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge D.W. Nelson

COUNSEL

Anthony D. Bornstein, Portland, Oregon for the appellant.

Erin C. Lagesen, Assistant Attorney General, Salem, Oregon, for the appellee.

OPINION

D.W. NELSON, Senior Circuit Judge:

Albert Roy and Phillip Kephart were both convicted of crimes in Oregon state court. The federal district court dismissed both of their federal habeas petitions as untimely because they were filed after the one-year statute of limitations period created by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). We consolidated their cases to answer a single question: Are Roy and Kephart entitled to an evidentiary hearing regarding their claim that the statute of limitations should be equitably tolled because they were transferred to an Arizona prison facility that, they allege, had a woefully deficient law library?

Because we decide that Roy and Kephart made sufficient allegations that they pursued their claims diligently and faced extraordinary circumstances once they were transferred to the Arizona prison facility, we remand this case to the district court to hold an evidentiary hearing.

I

Albert Roy pleaded guilty to two counts of first-degree sodomy in Oregon state court and was convicted of those two counts. Roy appealed this conviction to the Oregon Court of Appeals, which affirmed his conviction on August 23, 1995. Roy did not appeal either to the Oregon Supreme Court or the United States Supreme Court. Accordingly, his direct appeal became final on November 1, 1995.

During this time, Roy was imprisoned in Oregon, but on February 7, 1996, Roy was transferred to a private prison facility in Florence, Arizona. Roy remained at this Arizona facility until April 25, 1997, at which time he was returned to the Oregon prison facility. On February 28, 1997, while he was at the Arizona facility, Roy filed a petition for habeas relief in the United States District Court for the District of Arizona, complaining of his transfer to Arizona and the difficulties it presented for his efforts to continue to pursue a challenge to his conviction. The Arizona court transferred this case to the Oregon district court on August 28, 1998, and the Oregon district court eventually dismissed the case.

On October 22, 1997, while his initial attempt to file a federal habeas petition was pending, and after Roy was transferred back to the Oregon prison facility, Roy filed a petition for post-conviction relief in Oregon state court. This petition was denied. The Oregon Court of Appeals affirmed this denial without an opinion, and the Oregon Supreme Court denied review. The decision of the Oregon Supreme Court became final on December 5, 2000. On May 23, 2001, Roy filed the federal habeas petition leading to this appeal.

Philip Kephart was also convicted in Oregon state court. Kephart was convicted of four counts of second-degree assault, one count of first-degree assault, one count of attempted first-degree assault, and two counts of criminal mistreatment. The Oregon Court of Appeals affirmed his convictions on direct appeal. Kephart petitioned for review in the Oregon Supreme Court, and the Oregon Supreme Court remanded his case to the Oregon Court of Appeals, which again affirmed his convictions. After the Oregon Court of Appeals affirmed his convictions on remand, Kephart did not appeal either to the Oregon Supreme Court or to the United States Supreme Court, and therefore his direct appeal became final on December 8, 1995.

Like Roy, Kephart was initially imprisoned in Oregon, and was later transferred to the correctional facility in Florence, Arizona (on February 7, 1996). On May 6, 1997, Kephart filed his petition for post-conviction relief in Oregon state court, and shortly thereafter, on July 14, 1997, Kephart was returned to an Oregon prison. Kephart's petition for state post-conviction relief was denied on July 17, 1997. The Oregon Court of Appeals affirmed this decision, and the Oregon Supreme Court declined to review the case, a decision that became final on October 23, 2000. Kephart then filed his federal habeas petition, the petition at issue in this appeal, on May 14, 2001.

In both Roy and Kephart's cases, the district court adopted the suggestions of the magistrate judge, and eventually dismissed the habeas petitions as untimely. This court granted a certificate of appealability on the issue of "whether the district court properly denied appellant's federal habeas corpus petition as untimely and denied equitable tolling without an evidentiary hearing despite conflicting affidavits on a factual issue."

II

This court reviews de novo the district court's refusal to consider a petition for habeas corpus on grounds of tardiness. *Herbst v. Cook*, 260 F.3d 1039, 1042 (9th Cir. 2001). The decision by the district court to decline to order an evidentiary hearing is reviewed for abuse of discretion. *Tapia v. Roe*, 189 F.3d 1052. 1056 (9th Cir. 1999).

III

We first address whether the district court was correct to consider Roy and Kephart's federal petitions untimely, and we conclude that it was correct that their petitions were untimely.

[1] Pursuant to AEDPA, a prisoner may only file a federal habeas petition within one year from the conclusion of state direct review. 28 U.S.C. § 2244(d). This limitations period is tolled while a state prisoner is exhausting his claims in state court, *Nino v. Galaza*, 183 F.3d 1003, 1005 (9th Cir. 1999), and when a prisoner is trying to pursue state post-conviction remedies. *Id.* at 1006. However, the statute of limitations is not tolled "from the time a final decision is issued on direct state appeal [to] the time the first state collateral challenge is filed." *Id.* The statute of limitations period is also not tolled after state post-conviction proceedings are final and before federal habeas proceedings are initiated. *See* 28 U.S.C. § 2244(d)(2) (stating that the limitations period does not run while "a properly filed application for *State* post-conviction or other collateral review with respect to the pertinent judgment or claim is pending" (emphasis added)).

While the AEDPA statute of limitations was running in this case between the end of state direct proceedings and state post-conviction proceedings, *as well as* between the time of the end of their state post-conviction appeals and the filing of their federal habeas petition, only the former time period was longer than the one-year statute of limitations established by AEDPA. In other words, if the time period while Roy and Kephart were in Arizona is equitably tolled, then Roy and Kephart will not have exceeded AEDPA's one-year statute of limitations.

[2] For both Roy and Kephart, the final dispositions of their direct appeals occurred before the effective date of AEDPA, and therefore they "were required to file any remaining federal petition for which they were otherwise eligible within one year of AEDPA's effective date, that is, by April 24, 1997." *Laws v. LaMarque*, 351 F.3d 919, 921 (9th Cir. 2003). Roy filed his petition for state post-conviction relief on October 22, 1997, a full 551 days after April 24,

1996, well beyond the one-year limitation mandated by AEDPA.

But for this time period, when Roy filed his federal habeas petition, he would have been within the statute of limitations period provided by AEDPA. Roy's state post-conviction appeal became final on January 3, 2001, and Roy filed his federal habeas petition on June 11, 2001, meaning that if the time between his state direct and post-conviction appeals had been equitably tolled, only the time between the termination of his state post conviction appeals and his federal habeas petition would have counted, and the clock would have run for only 159 days of the one-year statute of limitations provided by AEDPA.

The same is true of Kephart. Kephart's direct appeal also became final before the effective date of AEDPA, meaning that he also was "required to file any remaining federal petition for which [he was] otherwise eligible within one year of AEDPA's effective date, that is, by April 24, 1997." *Id.* at 921. Kephart filed his petition for state post-conviction relief on May 6, 1997, twelve days after April 24, 1997, the latest date he could have filed pursuant to AEDPA's one-year statute of limitations. If that period of time had been equitably tolled, Kephart also would have easily avoided AEDPA's one-year statute of limitations. Kephart's state post-conviction efforts became final on December 5, 2000, and on May 23, 2001, 169 days later and well within the one-year AEDPA time frame, Kephart filed his federal habeas petition.

[3] For these reasons, it is clear that, unless the time period when Roy and Kephart were in Arizona is equitably tolled, Roy and Kephart filed their federal habeas petitions after the one-year statute of limitations provided by AEDPA. It is also clear that, if this time period is equitably tolled, Roy and Kephart filed their federal habeas petitions within the one-year statute of limitations provided by AEDPA.

IV

[4] This court has recognized that the AEDPA statute of limitations provisions violated by Roy and Kephart can be subject to equitable tolling. *See Calderon v. United States Dist. Court (Beeler)*, 128 F.3d 1283, 1288 (9th Cir. 1997), *overruled on other grounds by Calderon v. United States Dist. Court (Kelly)*, 163 F.3d 530 (9th Cir. 1998) (en banc). Equitable tolling is applicable only "if extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time." *Beeler*, 128 F.3d at 1288 (internal quotation marks omitted). These extraordinary circumstances must be "the cause of [the] untimeliness." *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003).

[5] A habeas petitioner like Roy or Kephart should receive an evidentiary hearing when he makes "a good-faith *allegation that would, if true*, entitle him to equitable tolling." *Laws v. LaMarque*, 351 F.3d 919, 919 (9th Cir. 2003) (emphasis added). Roy and Kephart must demonstrate that they have "been pursuing [their] rights diligently . . . [and] that some extraordinary circumstance stood in [their] way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005).

We therefore must first address whether Roy and Kephart made sufficient allegations of diligence to be entitled to an evidentiary hearing, and our precedents do not provide us much guidance regarding what diligence might mean in the AEDPA context.[15] Because both Roy and Kephart filed their

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[15] This court has found equitable tolling potentially warranted in several AEDPA cases, but has focused almost exclusively on whether the relevant "extraordinary circumstances" were present rather than whether the habeas petitioner had pursued their rights diligently. *See Laws v. LaMarque*, 351 F.3d 919, 919 (9th Cir. 2003); *Spitsyn v.*

habeas petitions *pro se*, allege specific efforts they pursued in order to file habeas petitions, and because both filed their claims within a reasonable period of time after they were transferred back to the Oregon facility and the extraordinary circumstances were removed, we find that Roy and Kephart presented sufficient evidence of their diligence to warrant an evidentiary hearing.

A

[6] As an initial matter, we consider it highly relevant that Roy and Kephart were proceeding *pro se* until appointed counsel by the district court. We must "construe *pro se* habeas filings liberally." *Allen v. Calderon*, 408 F.3d 1150, 1153 (9th Cir. 2005); *see also Belgarde v. State of Montana*, 123 F.3d 1210, 1213 (9th Cir. 1997) ("We construe a pro se litigant's habeas petition with deference."). Because Roy and Kephart were proceeding *pro se*, we construe their allegations regarding diligence liberally.

[7] It is clear that *pro se* status, on its own, is not enough to warrant equitable tolling. *See, e.g., Johnson v. United States*, 544 U.S. 295, 311, 125 S.Ct. 1571, 161 L.Ed.2d 542 (2005) ("[W]e have never accepted *pro se* representation alone or procedural ignorance as an excuse for prolonged inattention when a statute's clear policy calls for promptness."). But we also here reaffirm the clear principle

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Moore, 345 F.3d 796 (9th Cir. 2003); *Corjasso v. Ayers*, 278 F.3d 874 (9th Cir. 2002); *Jorss v. Gomez*, 311 F.3d 1189 (9th Cir. 2001); *Whalem/Hunt v. Early*, 233 F.3d 1146 (9th Cir. 2000), *Miles v. Prunty*, 187 F.3d 1104 (9th Cir. 1999); *Calderon v. United States Dist. Court (Beeler)*, 128 F.3d 1283 (9th Cir. 1997), *overruled on other grounds by Calderon v. United States Dist. Court (Kelly)*, 163 F.3d 530 (9th Cir. 1998) (en banc).

that, even though *pro se* status alone is not enough to warrant equitable tolling, it informs and colors the lens through which we view the filings, and whether these filings made sufficient allegations of diligence. *See Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990) ("This court recognizes that it has a duty to ensure that *pro se* litigators do not lose their claim due to ignorance of technical procedural requirements.").

B

Roy and Kephart made several allegations regarding their efforts to pursue their appeals diligently. After beginning efforts to file an appeal while in Arizona, Roy complained to Sheila Reed, the State of Oregon Governor's Advocate for Public Safety and the Corrections Ombudsman, that the Arizona facility did not have sufficient legal resources to enable Roy to pursue his claims. Roy in fact met with Reed in Arizona in person to complain about the law library.

[12] Roy also filed a federal lawsuit while in Arizona challenging the acceptability of the law library. It is true that, after this case was transferred to the district court in Oregon, that court dismissed Roy's lawsuit for lack of prosecution. This dismissal, though, does not make his filing of the lawsuit any less relevant in proving diligence. We are examining whether Roy had been diligent in his efforts to pursue his appeal *at the time his efforts* were being thwarted, namely while he was at the prison facility in Arizona. *Cf. Spitsyn*, 345 F.3d at 802 ("'[T]he person seeking equitable tolling [must demonstrate] reasonable diligence in attempting to file . . . *after* the extraordinary circumstances began." (emphasis added)).

Roy was transferred to the Arizona facility on February 7, 1996; he was transferred back to the Oregon facility on April 25, 1997. The judgment of the Oregon district court, though,

was issued on September 2, 1998, well after the relevant period we are examining to see if Roy was diligent in pursuing his appeal. Moreover, the judgment by the Oregon district court makes no reference to any specific time frame or actions revealing Roy's lack of diligence in pursuing his claims. Indeed, that decision simply states that it was construing Roy's case as a 42 U.S.C. § 1983 case, rather than a habeas case, and that therefore Roy had to provide an additional fee, an application to proceed *in forma pauperis*, or dismiss that case.

At the time that decision was issued, Roy was already safely back in Oregon, and therefore the entire reason why Roy filed the lawsuit--to complain of his move to Arizona--was obviated. It is unsurprising, and not particularly relevant, then, that Roy (voluntarily) dismissed his lawsuit. His failure to pursue the lawsuit further does not demonstrate a lack of diligence in protesting the conditions in Arizona; it demonstrates that the lawsuit was no longer necessary because Roy was no longer in Arizona.

Kephart also presented evidence of his efforts to file his claim while in Arizona. One of the affidavits in this case indicates that "Kephart was trying to file his state post conviction" claim and thus was present in the law library trying to do research. The fact that Kephart was able to discuss with specificity what precisely was present in the Arizona library also indicates he had visited the library at least on occasion. Kephart stated that the Arizona library "consisted of only three outdated legal books, which contained no information about the AEDPA."

Since we have no cases on point from this circuit, we look to cases from other circuits for guidance. *See United States v. Tobeler*, 311 F.3d 1201, 1203 (9th Cir. 2002) (noting the "persuasive [value of] authority from other circuits"). In cases finding the absence of diligence in an equitable tolling context

from our sister circuits, habeas petitioners demonstrated much less effort by the prisoners than Roy and Kephart demonstrated in this case.

[13] In *Helton v. Sec'y for the Dep't of Corr.*, 259 F.3d 1310 (11th Cir. 2001), the court found that the prisoner had not exercised reasonable diligence because he never asserted that he "asked for the amendments to the federal habeas corpus statutes," *id.* at 1314, and was in fact not "even aware the library did not have these materials at the time he filed his section 2254 petition," *id.* at 1313; *see also id.* at 1314 ("Helton fails to state *any* independent efforts he made to determine whether the relevant limitations period began to run.") (emphasis added).

In this case, by contrast, Kephart stated with specificity that the Arizona library "consisted of only three outdated legal books, which contained no information about AEDPA." Roy filed a federal lawsuit indicating that the Arizona library did not have "an Oregon trained legal assistant and a current adequate Oregon law library.[16]

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[16] Of course, we do not hold that a federal Arizona prison facility must emply an Oregon-trained legal assistant, nor do we hold that the lack of such a legal assistant could alone satisfy the "extraordinary circumstance" requirement for equitable tolling. Nevertheless, the fact that Roy timely filed a lawsuit alleging deficiencies in the Arizona facility is evidence of his diligence in trying to secure his rights. We leave for the district court to consider, after an evidentiary hearing, whether any lack of personnel or materials in the Arizona facility constituted a sufficiently "extraordinary circumstance" such that Roy and Kephart could not timely file their petitions.

Likewise, in *Miller v. Marr,* 141 F.3d 976 (10th Cir. 1998), the habeas petitioner's statements about law library inadequacies were less specific than those made here by Roy and Kephart. *Id.* ("It is not enough to say that the Minnesota facility lacked all relevant statutes and case law or that the procedure to request specific materials was inadequate."); *see also id.* at 978 ("In the final analysis, however, Mr. Miller has provided no specificity regarding the alleged lack of access and the steps he took to diligently pursue his federal claims.")

C

In addition to the specific efforts Roy and Kephart allege that they made to pursue their claims, we also consider it important that Roy and Kephart pursued their claims within a reasonable period of time *before* the external impediment[17]—in this case, the transfer to Arizona—came into existence. *See LaCava v. Kyler*, 398 F.3d 271, 277 (3rd Cir. 2005) ("This obligation [to act diligently] does not pertain solely to the filing of the federal habeas petition, rather it is an obligation that exists during the period appellant is exhausting state court remedies as well.")

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[17] We note that AEDPA itself provides that the statute of limitations "shall run from the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed[.]" 28 U.S.C. § 2244(d)(1)(B). Because we address the conditions of the Arizona prison library as a possible "impediment" as part of our equitable tolling argument, we need not address the identical statutory tolling arguments. *See Gaston v. Palmer*, 417 F.3d 1030, 1035 (9th Cir. 2005) ("[T]he district court's rejection of equitable tolling . . . constitutes an implicit rejection of [the] impediment argument.").

In *Miller*, in a context similar to this case, one of our sister circuits found that the habeas petitioner did not exercise reasonable diligence because, in addition to the absence of specific references to his efforts, the habeas petitioner waited a long time before filing his petition, in that case more than a year before the extraordinary circumstance being argued as the cause of equitable tolling was created. *Miller*, 141 F.3d at 978. Similarly, in *LaCava,* twenty-one months elapsed before the circumstances that the prisoner argued created equitable tolling arose. *LaCava*, 398 F.3d at 272.

In this case, Roy's direct appeal became final on January 30, 1996, and barely one week ensued before, on February 7, 1996, Roy was transferred to Arizona. Kephart's direct appeal became final on March 7, 1996, after he was transferred to Arizona on February 7, 1996.[18] Thus, Roy had just three months in which to file a state post-conviction petition after his direct appeal became final and before he was transferred to Arizona, and Kephart had no time at all.[19]

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[18] The evidence supporting Roy and Kephart's diligence is not affected if we measure their diligence based not on when their direct appeals became final but rather based on when the final *decisions or dispositions* of the court occurred. Roy's final effort at direct appeal was denied by the Oregon Supreme Court on August 23, 1995, approximately five months before he was transferred to Arizona, and Kephart's last judicial decision regarding his direct appeal was on October 11, 1995, less than four months before he was transferred to Arizona.

[19] In *Pace v. DiGuglielmo*, 544 U.S. 408, 125 S.Ct. 1807, 161 L.Ed.2d 669 (2005), the Supreme Court decided that a habeas petitioner was not entitled to equitable tolling because "not only did petitioner sit on his rights for years *before* he filed his [state post-conviction] petition, but he also sat on

D

We decline to adopt the district court's test and require that Roy and Kephart "indicate . . . when [they] asked for assistance none was provided . . . [and] provide the dates on which [they] attempted to obtain information from the Arizona facility." The purpose of requiring habeas petitioners to demonstrate diligence in order to be entitled to an evidentiary hearing regarding equitable tolling is to ensure that the extraordinary circumstances faced by petitioners like Roy and Kephart--and not their lack of diligence--were the cause of the tardiness of their federal habeas petitions. *Spitsyn v. Moore*, 345 F.3d 796, 802 (9th Cir. 2003) (" '[I]f the person seeking equitable tolling has not exercised reasonable diligence in attempting to file, after the extraordinary circumstances began, the link of causation between the extraordinary circumstances and the failure to file is broken.' " (*quoting Valverde v. Stinson*, 224 F.3d 129, 134 (2d Cir. 2000))).

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them for **five more months after** his [state post-conviction] proceedings became final before deciding to seek relief in federal court." *Id.* at 419 (emphasis and boldface added). It is true that, in this case, after their state post-conviction appeals were final and before they filed their federal habeas petitions, Roy waited about six months and Kephart around five months. However, the Supreme Court refused to recognize an equitable tolling claim in *Pace* not just because of the delay between the state post-conviction and federal habeas stages, but also because of the earlier, more egregious delays. *Id.* ("[P]etitioner waited years, without any valid justification, to assert these claims in his [post-conviction petition]. Had petitioner advanced his claims within a reasonable time of their availability, he would not now be facing any time problem.") (footnote omitted).

Since this is the reason for showing diligence, then habeas petitioners should not have to allege specific dates and times of library visits. Of course, the district court is correct that specific dates may be highly probative when petitioners attempt to show that they acted diligently in securing their rights. However, if the petitioners can allege facts showing that extraordinary circumstances—and not a lack of diligence—caused the failure to file, there is no need to require specific dates before holding an evidentiary hearing.

[14] By alleging what they did to pursue their claims and complain about their situations, and alleging that they did so before AEDPA's statute of limitations expired, Roy and Kephart have done enough to demonstrate that they were not the cause of their tardiness, and that they would have filed on time but for their transfer to Arizona. This is particularly so because we have earlier decided in the AEDPA equitable tolling context that "[o]ne event may have multiple causes. If [petitioner's] late filing was caused *both* by . . . [other things] and by prison officials' misconduct, [petitioner] still is entitled to equitable tolling, since prison officials' misconduct proximately caused the late filing." *Stillman v. LaMarque*, 319 F.3d 1199, 1203 (9th Cir. 2003).

V

A

Given that Roy and Kephart have made sufficient allegations regarding their diligence to entitle them to an evidentiary hearing, they must next demonstrate that "extraordinary circumstances beyond [their] control make it impossible to file a petition on time." *Beeler*, 128 F.3d at 1288. Whether Roy and Kephart have demonstrated extraordinary circumstances is clearly governed by a decision from this court directly on point, *Whalem/Hunt v. Early*, 233

F.3d at 1148, which compels a finding that Roy and Kephart made sufficient allegations of extraordinary circumstances.

In *Whalem/Hunt*, the en banc court remanded to the district court for an evidentiary hearing related to an equitable tolling argument for two primary reasons, both of which apply in this case. First of all, "the law library of the prison in which [the prisoner] is incarcerated did not have legal materials describing AEDPA until June 1998." *Id.* at 1147. The absence of AEDPA in the law library, when combined with the second relevant fact that the prisoner in *Whalem/Hunt* "had no knowledge of any limitations period," *id.*, led to the decision by the en banc court to remand for an evidentiary hearing.

In this case, Roy and Kephart made similar "allegation[s] that would, if true, entitle [them] to equitable tolling." *Laws*, 351 F.3d at 919. First, both alleged that the Arizona library did not have the requisite AEDPA materials. Roy stated that at the prison facility in Arizona "there was no law library available" and therefore he did not have access to AEDPA. Kephart stated that the Arizona "library . . . contained no information about the AEDPA."

In *Whalem/Hunt*, besides the issue of AEDPA availability, the court considered it important for the "extraordinary circumstances" determination that the prisoner stated that he "had no knowledge of any limitations period prior to December 1998." *Whalem/Hunt,* 233 F.3d at 1147 (internal quotation marks omitted). In this case, Roy indicated that similarly he was "not made aware of . . . the AEDPA." Kephart was in fact told by his attorney that the statute of limitations did not expire until December of 1997, eight months after the actual expiration date. Kephart's attorney told him of the date he believed to be the expiration date for filing his habeas claim after Kephart was already in Arizona, and therefore after the point at which he could have confirmed or disproved what his attorney informed him about AEDPA.

In addition to the two AEDPA-related reasons the *Whalem/Hunt* court remanded for an evidentiary hearing there are also other reasons present in *Whalem/Hunt* that suggest that Roy and Kephart may have faced extraordinary circumstances. While there was no evidence in *Whalem/Hunt* about the general condition of the library beyond the availability of AEDPA materials, in this case there was evidence suggesting that the problems related to AEDPA materials were part of a series of problems with the Arizona law library.[20] Kephart testified that he "had no access to current Oregon or federal law. The CCA library consisted of only three outdated legal books, which contained no information about the AEDPA . . . . At no time during my imprisonment was there information provided . . . explaining any procedure to obtain legal information relevant to Oregon prisoners."

Other affidavits also suggest that Roy and Kephart did not have access to much of a law library in Arizona. Douglas Phaneuf, an inmate working as a law librarian in Arizona, stated that "there was no Oregon case law." Phaneuf also stated that while "[i]t is possible that [correspondence with lawyer] assistance was available . . . I was not aware of it." Thomas J. Jensen, another inmate working as a librarian at the Arizona prison facility, stated that he did "not recall there being any meaningful federal material in the Florence library

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[20] Of course, in order to assess whether Roy and Kephart have stated a claim for an evidentiary hearing, we must consider their "good-faith allegation[s that] would, if true, entitle [them] to equitable tolling." *Laws*, 351 F.3d at 919 (emphasis added). We recognize that there is a dispute about the condition of the Arizona prison law library, which is why we believe the district court should have ordered an evidentiary hearing.

even after it had become established and obtained some books."

B

[15] While this evidence might suggest that this court could simply find (on its own and without a remand) that Roy and Kephart were entitled to equitable tolling, and that an evidentiary hearing is not necessary, we decline to follow that course of action. There remain significant conflicts among the affidavits on material issues, and "[i]n a *habeas* case, when there are only conflicting affidavits regarding the facts underlying the issue of cause, the district court must hold an evidentiary hearing." *Buffalo v. Sunn*, 854 F.2d 1158, 1165 (9th Cir. 1988); *see also id.* ("A district court conducting federal habeas review should not ordinarily attempt to resolve contested issues of fact based on affidavits alone unless there is other evidence in the record dispositive of the issue or unless the state court has made the relevant factual findings.").

For instance, regarding the question of the availability of AEDPA in the Arizona prison law library, there were conflicting statements. Kephart stated that in Arizona there were "no legal materials which described the AEDPA, and no other notice of the AEDPA." Phaneuf stated that he did "not know if there was in fact federal material." Jensen stated that there were never "any meaningful federal materials in the Florence library." By contrast, Martinez, also a prison law-library clerk, stated that AEDPA had "probably arrived" in 1996. Martinez also testified that information about the AEDPA statute of limitations had been posted, and the Federal Public Defenders had provided prisoners with that information as well. A representative from West Publishing indicated that the relevant portions of AEDPA were in fact sent to the Arizona prison facility.

There is also much in dispute regarding other aspects of the Arizona prison law library. While Trent Axen, the Library Coordinator at the Oregon State Penitentiary, testified about an elaborate series of materials available at the library in Arizona, and about a correspondence system permitting prisoners to request materials not in Arizona, the affidavits submitted by the inmates in Arizona disagree with this on almost every level.[21]

VI

Because we find that Roy and Kephart have made sufficient allegations regarding their diligence and the extraordinary circumstances they faced while at the Arizona prison, we remand to the district court for an evidentiary hearing on their equitable tolling claim.

PETITION GRANTED AND REMANDED.

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[21] Because we recognize that there are many conflicts among many of the affidavits on many issues, we need not address Roy and Kephart's claims that we should disallow some of the affidavits because they are not based on personal knowledge, pursuant to Federal Rule of Evidence 602. We need not decide which specific affidavits satisfy that Rule's requirements because we decide that there are so many conflicts that the district court should order an evidentiary hearing to gather new evidence and further assess the comments made in the affidavits.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALBERT ROY,

Petitioner-Appellant,

v.

ROBERT O. LAMPERT,

Respondent-Appellee.

No. 04-35514

D.C. No. CV-01-00861-CO

PHILLIP L. KEPHART,

Petitioner-Appellant,

v.

STAN CZERNIAK, Superintendent, OSP,

Respondent-Appellee.

No. 04-35626

D.C. No. CV-01-00690-CO

ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING/REHEARING EN BANC AND AMENDED OPINION

Appeal from the United States District Court
for the District of Oregon

John P. Cooney, Magistrate Judge, Presiding

Argued and Submitted
December 5, 2005—Portland, Oregon

Filed July 12, 2006

Amended September 22, 2006

Before: James R. Browning, Dorothy W. Nelson, and

Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge D.W. Nelson

COUNSEL

Anthony D. Bernstein, Portland, Oregon for the appellant.

Erin C. Lagesen, Assistant Attorney General, Salem, Oregon, for the appellee.

ORDER

The opinion filed on July 12, 2006, slip opinion at 7625 and published at 455 F.3d 945 (9th Cir. 2006) is amended as follows:

Page 7641 of the slip opinion, last words:

> Replace "[other things]" with "[circumstances other than petitioner's lack of diligence]"

Page 7643 of the slip opinion, last two sentences of the first full paragraph:

> Replace: "Kephart was in fact told by his attorney that the statute of limitations did not expire until December of 1997, eight months after the actual expiration date. Kephart's attorney told him of the date he believed to be the expiration date for filing his habeas claim after Kephart was already in Arizona, and therefore after the point at which he could have confirmed or disproved what his attorney informed him about AEDPA." With "Likewise, Kephart asserted that he had had "no . . . notice of the AEDPA" either from the prison library or from any other source, and that he "was not able to gain knowledge of the one year limitation period for filing under [AEDPA]" until

after he had filed his state post-conviction petition and had been returned to Oregon."

With these amendments, the members of the panel that decided this case voted unanimously to deny the petition for rehearing. Judge O'Scannlain voted to deny the petition for rehearing en banc. Judges Browning and Nelson recommended denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc.

The petition for rehearing and the petition for rehearing en banc are denied. No further petitions for rehearing or rehearing en banc may be filed.

OPINION

D.W. NELSON, Senior Circuit Judge:

Albert Roy and Phillip Kephart were both convicted of crimes in Oregon state court. The federal district court dismissed both of their federal habeas petitions as untimely because they were filed after the one-year statute of limitations period created by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). We consolidated their cases to answer a single question: Are Roy and Kephart entitled to an evidentiary hearing regarding their claim that the statute of limitations should be equitably tolled because they were transferred to an Arizona prison facility that, they allege, had a woefully deficient law library?

Because we decide that Roy and Kephart made sufficient allegations that they pursued their claims diligently and faced extraordinary circumstances once they were transferred to the

Arizona prison facility, we remand this case to the district court to hold an evidentiary hearing.

I

Albert Roy pleaded guilty to two counts of first-degree sodomy in Oregon state court and was convicted of those two counts. Roy appealed this conviction to the Oregon Court of Appeals, which affirmed his conviction on August 23, 1995. Roy did not appeal either to the Oregon Supreme Court or the United States Supreme Court. Accordingly, his direct appeal became final on November 1, 1995.

During this time, Roy was imprisoned in Oregon, but on February 7, 1996, Roy was transferred to a private prison facility in Florence, Arizona. Roy remained at this Arizona facility until April 25, 1997, at which time he was returned to the Oregon prison facility. On February 28, 1997, while he was at the Arizona facility, Roy filed a petition for habeas relief in the United States District Court for the District of Arizona, complaining of his transfer to Arizona and the difficulties it presented for his efforts to continue to pursue a challenge to his conviction. The Arizona court transferred this case to the Oregon district court on August 28, 1998, and the Oregon district court eventually dismissed the case.

On October 22, 1997, while his initial attempt to file a federal habeas petition was pending, and after Roy was transferred back to the Oregon prison facility, Roy filed a petition for post-conviction relief in Oregon state court. This petition was denied. The Oregon Court of Appeals affirmed this denial without an opinion, and the Oregon Supreme Court denied review. The decision of the Oregon Supreme Court became final on December 5, 2000. On May 23, 2001, Roy filed the federal habeas petition leading to this appeal.

Philip Kephart was also convicted in Oregon state court. Kephart was convicted of four counts of second-degree

assault, one count of first-degree assault, one count of attempted first-degree assault, and two counts of criminal mistreatment. The Oregon Court of Appeals affirmed his convictions on direct appeal. Kephart petitioned for review in the Oregon Supreme Court, and the Oregon Supreme Court remanded his case to the Oregon Court of Appeals, which again affirmed his convictions. After the Oregon Court of Appeals affirmed his convictions on remand, Kephart did not appeal either to the Oregon Supreme Court or to the United States Supreme Court, and therefore his direct appeal became final on December 8, 1995.

Like Roy, Kephart was initially imprisoned in Oregon, and was later transferred to the correctional facility in Florence, Arizona (on February 7, 1996). On May 6, 1997, Kephart filed his petition for post-conviction relief in Oregon state court, and shortly thereafter, on July 14, 1997, Kephart was returned to an Oregon prison. Kephart's petition for state post-conviction relief was denied on July 17, 1997. The Oregon Court of Appeals affirmed this decision, and the Oregon Supreme Court declined to review the case, a decision that became final on October 23, 2000. Kephart then filed his federal habeas petition, the petition at issue in this appeal, on May 14, 2001.

In both Roy and Kephart's cases, the district court adopted the suggestions of the magistrate judge, and eventually dismissed the habeas petitions as untimely. This court granted a certificate of appealability on the issue of "whether the district court properly denied appellant's federal habeas corpus petition as untimely and denied equitable tolling without an evidentiary hearing despite conflicting affidavits on a factual issue."

II

This court reviews de novo the district court's refusal to consider a petition for habeas corpus on grounds of tardiness. *Herbst v. Cook*, 260 F.3d 1039, 1042 (9th Cir. 2001). The decision by the district court to decline to order an evidentiary hearing is reviewed for abuse of discretion. *Tapia v. Roe*, 189 F.3d 1052. 1056 (9th Cir. 1999).

III

We first address whether the district court was correct to consider Roy and Kephart's federal petitions untimely, and we conclude that it was correct that their petitions were untimely.

[1] Pursuant to AEDPA, a prisoner may only file a federal habeas petition within one year from the conclusion of state direct review. 28 U.S.C. § 2244(d). This limitations period is tolled while a state prisoner is exhausting his claims in state court, *Nino v. Galaza*, 183 F.3d 1003, 1005 (9th Cir. 1999), and when a prisoner is trying to pursue state post-conviction remedies. *Id.* at 1006. However, the statute of limitations is not tolled "from the time a final decision is issued on direct state appeal [to] the time the first state collateral challenge is filed." *Id.* The statute of limitations period is also not tolled after state post-conviction proceedings are final and before federal habeas proceedings are initiated. *See* 28 U.S.C. § 2244(d)(2) (stating that the limitations period does not run while "a properly filed application for *State* post-conviction or other collateral review with respect to the pertinent judgment or claim is pending" (emphasis added)).

While the AEDPA statute of limitations was running in this case between the end of state direct proceedings and state post-conviction proceedings, *as well as* between the time of the end of their state post-conviction appeals and the filing of their federal habeas petition, only the former time period was longer than the one-year statute of limitations established by

AEDPA. In other words, if the time period while Roy and Kephart were in Arizona is equitably tolled, then Roy and Kephart will not have exceeded AEDPA's one-year statute of limitations.

[2] For both Roy and Kephart, the final dispositions of their direct appeals occurred before the effective date of AEDPA, and therefore they "were required to file any remaining federal petition for which they were otherwise eligible within one year of AEDPA's effective date, that is, by April 24, 1997." *Laws v. LaMarque*, 351 F.3d 919, 921 (9th Cir. 2003). Roy filed his petition for state post-conviction relief on October 22, 1997, a full 551 days after April 24, 1996, well beyond the one-year limitation mandated by AEDPA.

But for this time period, when Roy filed his federal habeas petition, he would have been within the statute of limitations period provided by AEDPA. Roy's state post-conviction appeal became final on January 3, 2001, and Roy filed his federal habeas petition on June 11, 2001, meaning that if the time between his state direct and post-conviction appeals had been equitably tolled, only the time between the termination of his state post conviction appeals and his federal habeas petition would have counted, and the clock would have run for only 159 days of the one-year statute of limitations provided by AEDPA.

The same is true of Kephart. Kephart's direct appeal also became final before the effective date of AEDPA, meaning that he also was "required to file any remaining federal petition for which [he was] otherwise eligible within one year of AEDPA's effective date, that is, by April 24, 1997." *Id.* at 921. Kephart filed his petition for state post-conviction relief on May 6, 1997, twelve days after April 24, 1997, the latest date he could have filed pursuant to AEDPA's one-year statute of limitations. If that period of time had been equitably

tolled, Kephart also would have easily avoided AEDPA's one-year statute of limitations. Kephart's state post-conviction efforts became final on December 5, 2000, and on May 23, 2001, 169 days later and well within the one-year AEDPA time frame, Kephart filed his federal habeas petition.

[3] For these reasons, it is clear that, unless the time period when Roy and Kephart were in Arizona is equitably tolled, Roy and Kephart filed their federal habeas petitions after the one-year statute of limitations provided by AEDPA. It is also clear that, if this time period is equitably tolled, Roy and Kephart filed their federal habeas petitions within the one-year statute of limitations provided by AEDPA.

IV

[4] This court has recognized that the AEDPA statute of limitations provisions violated by Roy and Kephart can be subject to equitable tolling. *See Calderon v. United States Dist. Court (Beeler)*, 128 F.3d 1283, 1288 (9th Cir. 1997), *overruled on other grounds by Calderon v. United States Dist. Court (Kelly)*, 163 F.3d 530 (9th Cir. 1998) (en banc). Equitable tolling is applicable only "if extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time." *Beeler*, 128 F.3d at 1288 (internal quotation marks omitted). These extraordinary circumstances must be "the cause of [the] untimeliness." *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003).

[5] A habeas petitioner like Roy or Kephart should receive an evidentiary hearing when he makes "a good-faith *allegation that would, if true*, entitle him to equitable tolling." *Laws v. LaMarque*, 351 F.3d 919, 919 (9th Cir. 2003) (emphasis added). Roy and Kephart must demonstrate that they have "been pursuing [their] rights diligently . . . [and] that some extraordinary circumstance stood in [their] way."

Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005).

We therefore must first address whether Roy and Kephart made sufficient allegations of diligence to be entitled to an evidentiary hearing, and our precedents do not provide us much guidance regarding what diligence might mean in the AEDPA context.[1] Because both Roy and Kephart filed their habeas petitions *pro se*, allege specific efforts they pursued in order to file habeas petitions, and because both filed their claims within a reasonable period of time after they were transferred back to the Oregon facility and the extraordinary circumstances were removed, we find that Roy and Kephart presented sufficient evidence of their diligence to warrant an evidentiary hearing.

A

[6] As an initial matter, we consider it highly relevant that Roy and Kephart were proceeding *pro se* until appointed counsel by the district court. We must "construe *pro se* habeas

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[1] This court has found equitable tolling potentially warranted in several AEDPA cases, but has focused almost exclusively on whether the relevant "extraordinary circumstances" were present rather than whether the habeas petitioner had pursued their rights diligently. *See Laws v. LaMarque*, 351 F.3d 919, 919 (9th Cir. 2003); *Spitsyn v. Moore*, 345 F.3d 796 (9th Cir. 2003); *Corjasso v. Ayers*, 278 F.3d 874 (9th Cir. 2002); *Jorss v. Gomez*, 311 F.3d 1189 (9th Cir. 2001); *Whalem/Hunt v. Early*, 233 F.3d 1146 (9th Cir. 2000), *Miles v. Prunty*, 187 F.3d 1104 (9th Cir. 1999); *Calderon v. United States Dist. Court (Beeler)*, 128 F.3d 1283 (9th Cir. 1997), *overruled on other grounds by Calderon v. United States Dist. Court (Kelly)*, 163 F.3d 530 (9th Cir. 1998) (en banc).

filings liberally." *Allen v. Calderon*, 408 F.3d 1150, 1153 (9th Cir. 2005); *see also Belgarde v. State of Montana*, 123 F.3d 1210, 1213 (9th Cir. 1997) ("We construe a pro se litigant's habeas petition with deference."). Because Roy and Kephart were proceeding *pro se*, we construe their allegations regarding diligence liberally.

[7] It is clear that *pro se* status, on its own, is not enough to warrant equitable tolling. *See, e.g., Johnson v. United States*, 544 U.S. 295, 311, 125 S.Ct. 1571, 161 L.Ed.2d 542 (2005) ("[W]e have never accepted *pro se* representation alone or procedural ignorance as an excuse for prolonged inattention when a statute's clear policy calls for promptness."). But we also here reaffirm the clear principle that, even though *pro se* status alone is not enough to warrant equitable tolling, it informs and colors the lens through which we view the filings, and whether these filings made sufficient allegations of diligence. *See Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990) ("This court recognizes that it has a duty to ensure that *pro se* litigators do not lose their claim due to ignorance of technical procedural requirements.").

B

Roy and Kephart made several allegations regarding their efforts to pursue their appeals diligently. After beginning efforts to file an appeal while in Arizona, Roy complained to Sheila Reed, the State of Oregon Governor's Advocate for Public Safety and the Corrections Ombudsman, that the Arizona facility did not have sufficient legal resources to enable Roy to pursue his claims. Roy in fact met with Reed in Arizona in person to complain about the law library.

[12] Roy also filed a federal lawsuit while in Arizona challenging the acceptability of the law library. It is true that, after this case was transferred to the district court in Oregon,

that court dismissed Roy's lawsuit for lack of prosecution. This dismissal, though, does not make his filing of the lawsuit any less relevant in proving diligence. We are examining whether Roy had been diligent in his efforts to pursue his appeal *at the time his efforts* were being thwarted, namely while he was at the prison facility in Arizona. *Cf. Spitsyn,* 345 F.3d at 802 ("'[T]he person seeking equitable tolling [must demonstrate] reasonable diligence in attempting to file . . . *after* the extraordinary circumstances began." (emphasis added)).

Roy was transferred to the Arizona facility on February 7, 1996; he was transferred back to the Oregon facility on April 25, 1997. The judgment of the Oregon district court, though, was issued on September 2, 1998, well after the relevant period we are examining to see if Roy was diligent in pursuing his appeal. Moreover, the judgment by the Oregon district court makes no reference to any specific time frame or actions revealing Roy's lack of diligence in pursuing his claims. Indeed, that decision simply states that it was construing Roy's case as a 42 U.S.C. § 1983 case, rather than a habeas case, and that therefore Roy had to provide an additional fee, an application to proceed *in forma pauperis*, or dismiss that case.

At the time that decision was issued, Roy was already safely back in Oregon, and therefore the entire reason why Roy filed the lawsuit--to complain of his move to Arizona--was obviated. It is unsurprising, and not particularly relevant, then, that Roy (voluntarily) dismissed his lawsuit. His failure to pursue the lawsuit further does not demonstrate a lack of diligence in protesting the conditions in Arizona; it demonstrates that the lawsuit was no longer necessary because Roy was no longer in Arizona.

Kephart also presented evidence of his efforts to file his claim while in Arizona. One of the affidavits in this case

indicates that "Kephart was trying to file his state post conviction" claim and thus was present in the law library trying to do research. The fact that Kephart was able to discuss with specificity what precisely was present in the Arizona library also indicates he had visited the library at least on occasion. Kephart stated that the Arizona library "consisted of only three outdated legal books, which contained no information about the AEDPA."

Since we have no cases on point from this circuit, we look to cases from other circuits for guidance. *See United States v. Tobeler*, 311 F.3d 1201, 1203 (9th Cir. 2002) (noting the "persuasive [value of] authority from other circuits"). In cases finding the absence of diligence in an equitable tolling context from our sister circuits, habeas petitioners demonstrated much less effort by the prisoners than Roy and Kephart demonstrated in this case.

[13] In *Helton v. Sec'y for the Dep't of Corr.*, 259 F.3d 1310 (11th Cir. 2001), the court found that the prisoner had not exercised reasonable diligence because he never asserted that he "asked for the amendments to the federal habeas corpus statutes," *id.* at 1314, and was in fact not "even aware the library did not have these materials at the time he filed his section 2254 petition," *id.* at 1313; *see also id.* at 1314 ("Helton fails to state *any* independent efforts he made to determine whether the relevant limitations period began to run.") (emphasis added).

In this case, by contrast, Kephart stated with specificity that the Arizona library "consisted of only three outdated legal books, which contained no information about AEDPA." Roy filed a federal lawsuit indicating that the Arizona library did

not have "an Oregon trained legal assistant and a current adequate Oregon law library.[2]

Likewise, in *Miller v. Marr,* 141 F.3d 976 (10th Cir. 1998), the habeas petitioner's statements about law library inadequacies were less specific than those made here by Roy and Kephart. *Id.* ("It is not enough to say that the Minnesota facility lacked all relevant statutes and case law or that the procedure to request specific materials was inadequate."); *see also id.* at 978 ("In the final analysis, however, Mr. Miller has provided no specificity regarding the alleged lack of access and the steps he took to diligently pursue his federal claims.")

C

In addition to the specific efforts Roy and Kephart allege that they made to pursue their claims, we also consider it important that Roy and Kephart pursued their claims within a reasonable period of time *before* the external impediment[3]—

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[2] Of course, we do not hold that a federal Arizona prison facility must emply an Oregon-trained legal assistant, nor do we hold that the lack of such a legal assistant could alone satisfy the "extraordinary circumstance" requirement for equitable tolling. Nevertheless, the fact that Roy timely filed a lawsuit alleging deficiencies in the Arizona facility is evidence of his diligence in trying to secure his rights. We leave for the district court to consider, after an evidentiary hearing, whether any lack of personnel or materials in the Arizona facility constituted a sufficiently "extraordinary circumstance" such that Roy and Kephart could not timely file their petitions.

[3] We note that AEDPA itself provides that the statute of limitations "shall run from the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the Untied States is removed[.]"

in this case, the transfer to Arizona—came into existence. *See LaCava v. Kyler*, 398 F.3d 271, 277 (3rd Cir. 2005) ("This obligation [to act diligently] does not pertain solely to the filing of the federal habeas petition, rather it is an obligation that exists during the period appellant is exhausting state court remedies as well.")

In *Miller*, in a context similar to this case, one of our sister circuits found that the habeas petitioner did not exercise reasonable diligence because, in addition to the absence of specific references to his efforts, the habeas petitioner waited a long time before filing his petition, in that case more than a year before the extraordinary circumstance being argued as the cause of equitable tolling was created. *Miller*, 141 F.3d at 978. Similarly, in *LaCava,* twenty-one months elapsed before the circumstances that the prisoner argued created equitable tolling arose. *LaCava*, 398 F.3d at 272.

In this case, Roy's direct appeal became final on January 30, 1996, and barely one week ensued before, on February 7, 1996, Roy was transferred to Arizona. Kephart's direct appeal became final on March 7, 1996, after he was transferred to Arizona on February 7, 1996.[4] Thus, Roy had just three

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28 U.S.C. § 2244(d)(1)(B). Because we address the conditions of the Arizona prison library as a possible "impediment" as part of our equitable tolling argument, we need not address the identical statutory tolling arguments. *See Gaston v. Palmer*, 417 F.3d 1030, 1035 (9th Cir. 2005) ("[T]he district court's rejection of equitable tolling . . . constitutes an implicit rejection of [the] impediment argument.").

[4] The evidence supporting Roy and Kephart's diligence is not affected if we measure their diligence based not on when their direct appeals became final but rather based on when the final *decisions or dispositions* of the court occurred. Roy's final effort at direct appeal was denied by the Oregon

months in which to file a state post-conviction petition after his direct appeal became final and before he was transferred to Arizona, and Kephart had no time at all.[5]

D

We decline to adopt the district court's test and require that Roy and Kephart "indicate . . . when [they] asked for assistance none was provided . . . [and] provide the dates on

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Supreme Court on August 23, 1995, approximately five months before he was transferred to Arizona, and Kephart's last judicial decision regarding his direct appeal was on October 11, 1995, less than four months before he was transferred to Arizona.

[5] In *Pace v. DiGuglielmo*, 544 U.S. 408, 125 S.Ct. 1807, 161 L.Ed.2d 669 (2005), the Supreme Court decided that a habeas petitioner was not entitled to equitable tolling because "not only did petitioner sit on his rights for years *before* he filed his [state post-conviction] petition, but he also sat on them for **five more months after** his [state post-conviction] proceedings became final before deciding to seek relief in federal court." *Id.* at 419 (emphasis and boldface added). It is true that, in this case, after their state post-conviction appeals were final and before they filed their federal habeas petitions, Roy waited about six months and Kephart around five months. However, the Supreme Court refused to recognize an equitable tolling claim in *Pace* not just because of the delay between the state post-conviction and federal habeas stages, but also because of the earlier, more egregious delays. *Id.* ("[P]etitioner waited years, without any valid justification, to assert these claims in his [post-conviction petition]. Had petitioner advanced his claims within a reasonable time of their availability, he would not now be facing any time problem.") (footnote omitted).

which [they] attempted to obtain information from the Arizona facility." The purpose of requiring habeas petitioners to demonstrate diligence in order to be entitled to an evidentiary hearing regarding equitable tolling is to ensure that the extraordinary circumstances faced by petitioners like Roy and Kephart--and not their lack of diligence--were the cause of the tardiness of their federal habeas petitions. *Spitsyn v. Moore*, 345 F.3d 796, 802 (9th Cir. 2003) (" '[I]f the person seeking equitable tolling has not exercised reasonable diligence in attempting to file, after the extraordinary circumstances began, the link of causation between the extraordinary circumstances and the failure to file is broken.' " (*quoting Valverde v. Stinson*, 224 F.3d 129, 134 (2d Cir. 2000))).

Since this is the reason for showing diligence, then habeas petitioners should not have to allege specific dates and times of library visits. Of course, the district court is correct that specific dates may be highly probative when petitioners attempt to show that they acted diligently in securing their rights. However, if the petitioners can allege facts showing that extraordinary circumstances—and not a lack of diligence—caused the failure to file, there is no need to require specific dates before holding an evidentiary hearing.

[14] By alleging what they did to pursue their claims and complain about their situations, and alleging that they did so before AEDPA's statute of limitations expired, Roy and Kephart have done enough to demonstrate that they were not the cause of their tardiness, and that they would have filed on time but for their transfer to Arizona. This is particularly so because we have earlier decided in the AEDPA equitable tolling context that "[o]ne event may have multiple causes. If [petitioner's] late filing was caused *both* by . . . [circumstances other than petitioner's lack of diligence] and by prison officials' misconduct, [petitioner] still is entitled to equitable

tolling, since prison officials' misconduct proximately caused the late filing." *Stillman v. LaMarque*, 319 F.3d 1199, 1203 (9th Cir. 2003).

V

A

Given that Roy and Kephart have made sufficient allegations regarding their diligence to entitle them to an evidentiary hearing, they must next demonstrate that "extraordinary circumstances beyond [their] control make it impossible to file a petition on time." *Beeler*, 128 F.3d at 1288. Whether Roy and Kephart have demonstrated extraordinary circumstances is clearly governed by a decision from this court directly on point, *Whalem/Hunt v. Early*, 233 F.3d at 1148, which compels a finding that Roy and Kephart made sufficient allegations of extraordinary circumstances.

In *Whalem/Hunt*, the en banc court remanded to the district court for an evidentiary hearing related to an equitable tolling argument for two primary reasons, both of which apply in this case. First of all, "the law library of the prison in which [the prisoner] is incarcerated did not have legal materials describing AEDPA until June 1998." *Id.* at 1147. The absence of AEDPA in the law library, when combined with the second relevant fact that the prisoner in *Whalem/Hunt* "had no knowledge of any limitations period," *id.*, led to the decision by the en banc court to remand for an evidentiary hearing.

In this case, Roy and Kephart made similar "allegation[s] that would, if true, entitle [them] to equitable tolling." *Laws*, 351 F.3d at 919. First, both alleged that the Arizona library did not have the requisite AEDPA materials. Roy stated that at the prison facility in Arizona "there was no law library available" and therefore he did not have access to AEDPA. Kephart stated that the Arizona "library . . . contained no information about the AEDPA."

In *Whalem/Hunt*, besides the issue of AEDPA availability, the court considered it important for the "extraordinary circumstances" determination that the prisoner stated that he "had no knowledge of any limitations period prior to December 1998." *Whalem/Hunt,* 233 F.3d at 1147 (internal quotation marks omitted). In this case, Roy indicated that similarly he was "not made aware of . . . the AEDPA."Likewise, Kephart asserted that he had had "no . . . notice of the AEDPA" either from the prison library or from any other source, and that he "was not able to gain knowledge of the one year limitation period for filing under [AEDPA]" until after he had filed his state post-conviction petition and had been returned to Oregon."

In addition to the two AEDPA-related reasons the *Whalem/Hunt* court remanded for an evidentiary hearing there are also other reasons present in *Whalem/Hunt* that suggest that Roy and Kephart may have faced extraordinary circumstances. While there was no evidence in *Whalem/Hunt* about the general condition of the library beyond the availability of AEDPA materials, in this case there was evidence suggesting that the problems related to AEDPA materials were part of a series of problems with the Arizona law library.[6] Kephart testified that he "had no access to current Oregon or federal law. The CCA library consisted of only three outdated legal books, which contained no

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[6] Of course, in order to assess whether Roy and Kephart have stated a claim for an evidentiary hearing, we must consider their "good-faith allegation[s that] would, if true, entitle [them] to equitable tolling." *Laws,* 351 F.3d at 919 (emphasis added). We recognize that there is a dispute about the condition of the Arizona prison law library, which is why we believe the district court should have ordered an evidentiary hearing.

information about the AEDPA . . . . At no time during my imprisonment was there information provided . . . explaining any procedure to obtain legal information relevant to Oregon prisoners."

Other affidavits also suggest that Roy and Kephart did not have access to much of a law library in Arizona. Douglas Phaneuf, an inmate working as a law librarian in Arizona, stated that "there was no Oregon case law." Phaneuf also stated that while "[i]t is possible that [correspondence with lawyer] assistance was available . . . I was not aware of it." Thomas J. Jensen, another inmate working as a librarian at the Arizona prison facility, stated that he did "not recall there being any meaningful federal material in the Florence library even after it had become established and obtained some books."

B

[15] While this evidence might suggest that this court could simply find (on its own and without a remand) that Roy and Kephart were entitled to equitable tolling, and that an evidentiary hearing is not necessary, we decline to follow that course of action. There remain significant conflicts among the affidavits on material issues, and "[i]n a *habeas* case, when there are only conflicting affidavits regarding the facts underlying the issue of cause, the district court must hold an evidentiary hearing." *Buffalo v. Sunn*, 854 F.2d 1158, 1165 (9th Cir. 1988); *see also id.* ("A district court conducting federal habeas review should not ordinarily attempt to resolve contested issues of fact based on affidavits alone unless there is other evidence in the record dispositive of the issue or unless the state court has made the relevant factual findings.").

For instance, regarding the question of the availability of AEDPA in the Arizona prison law library, there were

conflicting statements. Kephart stated that in Arizona there were "no legal materials which described the AEDPA, and no other notice of the AEDPA." Phaneuf stated that he did "not know if there was in fact federal material." Jensen stated that there were never "any meaningful federal materials in the Florence library." By contrast, Martinez, also a prison law-library clerk, stated that AEDPA had "probably arrived" in 1996. Martinez also testified that information about the AEDPA statute of limitations had been posted, and the Federal Public Defenders had provided prisoners with that information as well. A representative from West Publishing indicated that the relevant portions of AEDPA were in fact sent to the Arizona prison facility.

There is also much in dispute regarding other aspects of the Arizona prison law library. While Trent Axen, the Library Coordinator at the Oregon State Penitentiary, testified about an elaborate series of materials available at the library in Arizona, and about a correspondence system permitting prisoners to request materials not in Arizona, the affidavits submitted by the inmates in Arizona disagree with this on almost every level.[7]

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[7] Because we recognize that there are many conflicts among many of the affidavits on many issues, we need not address Roy and Kephart's claims that we should disallow some of the affidavits because they are not based on personal knowledge, pursuant to Federal Rule of Evidence 602. We need not decide which specific affidavits satisfy that Rule's requirements because we decide that there are so many conflicts that the district court should order an evidentiary hearing to gather new evidence and further assess the comments made in the affidavits.

VI

Because we find that Roy and Kephart have made sufficient allegations regarding their diligence and the extraordinary circumstances they faced while at the Arizona prison, we remand to the district court for an evidentiary hearing on their equitable tolling claim.

PETITION GRANTED AND REMANDED.

Supreme Court, U.S.
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(3)

No. 06-1015

In the Supreme Court of the United States

BRIAN BELLEQUE, Superintendent, Oregon State Penitentiary,

Petitioner,

v.

PHILLIP L. KEPHART,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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REPLY BRIEF

A. Respondent does not respond to many of the points made in the petition.

What is perhaps first striking about the brief in opposition is that respondent ignores and does not take issue with many of the central points made in the petition for a writ of certiorari. That is, what is first notable is not what the brief in opposition says, but what it fails to address.

The petition notes that the Ninth Circuit Court of Appeals treated respondent Kephart as though he were proceeding *pro se*, stating that it was "highly relevant" that he was "proceeding *pro se*," and on that basis "construe[ing] [his] allegations regarding diligence liberally." *Roy v. Lampert*, 455 F.3d 945, *amended* 465 F.3d 964, 970 (9th Cir. 2006).[1] The Ninth Circuit did so even though Kephart had been represented by counsel for about two and a half years when the district court's judgment was entered, and even though counsel was allowed to and did submit additional evidentiary materials in support of Kephart's equitable tolling claim. (Pet. Cert. 11). The State's petition contends that treating Kephart as though he were *pro se* in this circumstance is unprecedented, conflicts with the approach taken by this Court in *Baldwin Co. Welcome Center v. Brown*, 466 U.S. 147, 150 n. 4 (1984), and could result in significant and adverse impacts on habeas corpus practice in the circuit because Kephart's situation – initially filing *pro se* and then having counsel appointed – is

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[1] As the petition mentions, the Ninth Circuit on its own motion consolidated the appeal in this case with the appeal in *Roy v. Lampert*. *See Roy*, 465 F.3d at 967. The State's petition for rehearing and suggestion for rehearing *en banc* was limited to Kephart's case only, as is the State's petition for a writ of certiorari.

such a common one. Respondent offers no defense of this Ninth Circuit holding. He never mentions it in the brief in opposition.

The Ninth Circuit also held, based on the most conclusory of allegations, that Kephart was entitled to an evidentiary hearing on his claim of equitable tolling. The petition asserts that the Ninth Circuit's approach, rewarding meager and unspecific allegations with an evidentiary hearing, is inconsistent with the more-demanding standards employed by the Second, Third, Seventh, and Eleventh Circuits. (Pet. Cert. 17-19). Respondent does not appear to disagree that there is a conflict. This claim too is not addressed in his brief in opposition.

Finally, the petition argues that the Ninth Circuit so reduced the diligence component of an equitable tolling claim as to render that aspect of a claim virtually meaningless. (Pet. Cert. 19-20). The insufficient showing approved by the Ninth Circuit conflicts with the more stringent approach taken by the Fifth, Tenth, and Eleventh Circuits, which in turn are not consistent with each other. (Pet. Cert. 21-24). The State's petition identifies and describes the three disparate courts of appeals' approaches to claims of equitable tolling in federal habeas corpus that are based on allegations of inadequacies in prison law libraries and on lack of access to legal materials, as this case is. (Pet. Cert. 23-24). Respondent does not reply to or dispute that claim either. He does not contend that there is no conflict.

Thus, the circuit conflicts highlighted in the petition for a writ of certiorari stand unaddressed and unrebutted by respondent. And respondent offers no defense of the Ninth Circuit's treatment of a long-counseled habeas petitioner as if he were *pro se*.

B. Respondent's arguments about the showing required for an evidentiary hearing and about what constitutes diligence are case-specific and largely irrelevant.

As noted above, the petition asserts that, assuming equitable tolling is available at all, the Ninth Circuit set the bar for obtaining an evidentiary hearing on such a claim far too low and that the court diluted the diligence component of an equitable tolling claim. The petition also argues that the Ninth Circuit's approach to these issues conflicts with the analytical approach used by other circuit courts of appeals. (Pet. Cert. 16-24). Rather than disagreeing that there is a circuit split, respondent offers much more case-specific and myopic contentions.

Respondent first complains that, "[i]n the courts below, the state did not cite a single case of a similarly situated Oregon inmate," transferred to an out-of-state privately-run prison facility and then returned to an Oregon institution, "who filed [his federal habeas corpus petition] within the statute of limitations." (Opp. Br. 4). Why that should matter when the State's objections are to the Ninth Circuit's legal analysis is unclear. Respondent also contends that "no Oregon prisoner sent to Arizona filed a timely, non-defaulted federal petition." (Opp. Br. 4). But the only evidence he offers in support of that assertion is a citation to a district court case involving an Oregon inmate, sent to Arizona, who filed his federal habeas petition *on time*, but whose claims were procedurally defaulted. (Opp. Br. 4, citing *Griffen v. Johnson*, No. 98-888 (D. Or. 2000)).

Respondent next contends that, if this case were truly worthy of certiorari, the State would have sought the issuance of a writ in Roy's case too. (Opp. Br. 4-5). Seeking the issuance of a writ in Kephart's case only is all that is needed to put the legal issues the State wishes to advance before this Court, however. There is no need to add Roy's case to the mix. And

the "strategic selection" of Kephart's case as the vehicle to use to raise t[illegible]road-based legal issues the State is interested in is not particularly mysterious. Without conceding that Roy is in any way entitled to relief in habeas corpus, and without agreeing with the Ninth Circuit's holding that he is entitled to an evidentiary hearing on his equitable tolling claim, nevertheless his equitable tolling claim appears to be somewhat stronger than Kephart's. *See Roy,* 465 F.3d at 970-71 (Roy complained to the State corrections ombudsman about the legal resources available at the Arizona facility; he met with the ombudsman in Arizona to complain about the law library; and he filed a federal lawsuit while in Arizona challenging the acceptability of the law library); *Howell v. Mahoney*, 2006 US Dist LEXIS 92856, *6-7 (D. Mont. 2006) (citing those aspects of *Roy* as suggesting diligence); *Moreno v. Harrison,* 2006 US Dist LEXIS 62635, *23 (N.D. Cal. 2006) (same). And the facts can make a difference even when it is legal issues that are at the forefront. That is all that is signaled by the State's "strategic selection," as respondent puts it. (Opp. Br. 4).

Respondent faults the State for what he contends is "an unfounded prediction concerning the impact of the Ninth Circuit's decision in *Roy*." (Opp. Br. 5). Although the State contends that "the *Roy* decision will 'adversely affect the States in the circuit,'" leading "'to many unnecessary and, for the States, time consuming and expensive evidentiary hearings,'" (Opp. Br. 5, quoting Pet. Cert. 11), according to respondent "[t]hat forecast is wholly inaccurate." (Opp. Br. 5). For that assertion, respondent relies on (1) general statements of law made in other, earlier Ninth Circuit decisions, (2) the fact that, since *Roy*, in only one district court case citing *Roy* did the court order an evidentiary hearing on equitable tolling, while in another "the court found equitable tolling based on the paper record alone," and (3) the claim that district courts in the circuit do not often grant evidentiary hearings. (Opp. Br. 6-9).

All of those claims, even if accurate, miss the mark.[2] The State's complaint is not with broad statements of law that the Ninth Circuit has made in other, earlier cases, but with the legal analysis employed by the court in this case and with the adverse impacts on the States and on federal habeas practice that may result from this decision. And, given that the Ninth Circuit issued its amended opinion in this case only a little over five months ago, and that it may take awhile for the court's decision actually to result in more evidentiary hearings that lead to written decisions, the lack of such decisions at this point is neither surprising nor comforting to the State. In any event, even accepting respondent's assertions, the decision in *Roy* has already led to one evidentiary hearing on equitable tolling and one district court decision finding equitable tolling without an evidentiary hearing. If the district courts in the circuit were as unlikely to grant evidentiary hearings on claims of equitable tolling before *Roy* as respondent suggests, then respondent's post-*Roy* statistics hardly alleviate the State's concerns.

Thus, in the face of the State's complaints that the Ninth Circuit made it too easy to obtain an evidentiary hearing on equitable tolling and that it set the bar too low for the diligence component of such a claim, and in the face of the State's arguments that the Ninth Circuit's approach conflicts with that of other circuit courts of appeals, respondent offers only case-specific and largely irrelevant responses.

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[2] Respondent contends that "[r]esearch indicates that in the Districts of Oregon and Washington, there never has been a hearing on equitable tolling of the AEDPA statute of limitations." (Opp. Br. 7). He offers no support for that assertion.

C. Equitable tolling is not available to excuse the untimely filing of section 2254 habeas petition.

In its petition, the State argued that equitable tolling is not available to excuse the otherwise untimely filing of a federal habeas corpus petition brought under 28 U.S.C. § 2254. (Pet. Cert. 13-16). In an *amici curiae* brief, 32 other States join in that contention and urge this Court to grant certiorari to consider that significant legal issue.

Respondent replies that the State did not raise that issue below. (Opp. Br. 9-10). The State candidly admitted as much in its petition. (Pet. Cert. 13-14 n. 7). The State's failure to have raised the issue earlier does not preclude this Court's review. In the first place, in this case the Ninth Circuit, relying on that court's earlier precedent, held that "the AEDPA statute of limitations provisions * * * can be subject to equitable tolling." *Roy*, 465 F.3d at 969, citing *Calderon v. United States Dist. Court (Beeler)*, 128 F.3d 1283, 1288 (9th Cir. 1997), *overruled on other grds by Calderon v. United States Dist. Court (Kelly)*, 163 F.3d 530 (9th Cir. 1998) (*en banc*). It is "the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed *or passed upon* in the courts below." *Kentucky v. Stincer*, 482 U.S. 730, 747 n. 22 (1987) (internal quotation marks and citations omitted; emphasis added). Here, the Ninth Circuit "passed upon" the issue of whether equitable tolling is available in this federal habeas corpus context.[3]

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[3] Moreover, it would have been futile for the State to have challenged the court's earlier decisions. The court simply would have relied on them.

In addition, and even if the State's failure to have raised the issue below meant that it could not directly raise the issue now, if this Court were to grant certiorari on some other question or questions presented in the State's petition, the Court could consider the additional legal issue of the availability of equitable tolling in a section 2254 case. Once this Court's jurisdiction has attached, "consideration of issues not present in the jurisdictional statement or petition for certiorari *and not presented in the [lower court]* is not beyond [the Court's] power, and in appropriate circumstances [the Court] ha[s] addressed them." *Vance v. Terrazas*, 444 U.S. 252, 258-59 n. 5 (1980) (emphasis added). It would be appropriate to discuss this important legal issue here because of the significant interest that the States, habeas petitioners, and lower federal courts have in the issue, and because it logically underlies the other issues involving equitable tolling that are raised in the petition.

The cases on which respondent relies as indicating that the State cannot pursue the issue of the availability of equitable tolling are inapposite. Respondent cites *Baldwin v. Reese*, 541 U.S. 27 (2004) (Opp. Br. 10), but there the Court observed that "[u]nder this Court's Rule 15.2, 'a nonjurisdictional argument not raised in a respondent's brief in opposition to a petition for a writ of certiorari may be deemed waived.'" *Id.*, 541 U.S. at 34. That rule, and that holding, do not apply here.[4] Respondent also cites *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002). (Opp. Br. 10). In that case, the Court held that an issue not raised by a respondent in the courts below was "waived." *Id.*, 537 U.S. at 56 n. 4. Nothing in the Court's opinion suggests that the courts below had ruled on the issue, however, and that fact distinguishes this case from that one.

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[4] Moreover, in *Reese* the Ninth Circuit had not passed on the issue that respondent raised in his merits brief. *Id.*

Finally, respondent relies on *Roberts v. Galen of Va., Inc.*, 525 U.S. 249 (1999) (*per curiam*). (Opp. Br. 10). There, this Court refused to consider two alternative grounds for affirmance offered by the respondent because they "do not appear to have been sufficiently developed below for [the Court] to assess them." *Id.*, 525 U.S. at 253-54. Because the equitable tolling issue here is a legal one, there is no factual record that needed to be "sufficiently developed below." Thus, this decision too is inapplicable.

On the merits of the State's claim that equitable tolling is not available in a case brought under section 2254, respondent contends that "[i]t is well settled that the statute of limitations is subject to equitable tolling." (Opp. Br. 11). If that were true, this Court would not have twice pointed out, the last time quite recently, that this Court has not yet ruled on the issue. *Lawrence v. Florida*, ___ U.S. ___ (2/20/07) (slip op. 8) ("We have not decided whether § 2244(d) allows for equitable tolling," but assuming it does because the parties proceeded on that assumption); *Pace v. DiGuglielmo*, 544 U.S. 408, 418 n. 8 (2005) (same). Moreover, although respondent is correct in asserting that there is no circuit split on the issue (Opp. Br. 11), that hardly offers any solace to the States if the circuits that have ruled on the issue have all gotten it wrong, leading to much unnecessary litigation over the precise contours of equitable tolling in the habeas corpus setting.

Respondent also contends that this Court's decision in *United States v. Brockamp*, 519 U.S. 347 (1997), relied on by the State in its petition (Pet. Cert. 15-16), is inapplicable and "has nothing to say" in this context because it is about tax law and because habeas corpus is an equitable remedy. (Opp. Br. 11-12). Respondent misunderstands the basis for the State's reliance on *Brockamp* and why it is significant here. The important teaching of *Brockamp* is, as this Court later stated in *United States v. Beggerly*, 524 U.S. 38, 48 (1998), that

"[e]quitable tolling is not permissible where it is inconsistent with the text of the relevant statute." The State's point is not that *Brockamp* (or *Beggerly,* which respondent ignores) is directly applicable here, but that the text of section 2244(d) also is inconsistent with equitable tolling and that the lower federal courts that have ruled that equitable tolling is available have failed to give due attention to the statutory text. *See Brockamp*, 519 U.S. at 351-52 (relying on the "explicit exceptions" to the time limits set out in the statute and on the statute's detail); *Beggerly,* 524 U.S. at 48 (concluding that equitable tolling is inconsistent with the statute at issue there, in part because the statute effectively already provided for equitable tolling because it started the clock running when the plaintiff knew or should have known of the claim).[5]

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[5] 28 U.S.C. § 2244(d)(D) states that the limitations period runs from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." The statute is set out in full in the petition. (Pet. Cert. 2-3).

CONCLUSION

For the reasons set out in the petition and in this reply brief, petitioner respectfully requests that this Court grant the petition for certiorari and reverse the decision of the court below.

Respectfully submitted,

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March 7, 2007

(2)

No. 06-1015

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

BRIAN BELLEQUE, SUPERINTENDENT,
OREGON STATE PENITENTIARY,

Petitioner,

v.

PHILLIP L. KEPHART,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICI CURIAE BRIEF OF CALIFORNIA, ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, HAWAII, IDAHO, IOWA, KANSAS, KENTUCKY, LOUISIANA, MARYLAND, MICHIGAN, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, WISCONSIN, AND WYOMING IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

In *United States* v. *Beggerly*, 524 U.S. 38, 48 (1998), this Court held in a unanimous decision that "[e]quitable tolling is not permissible where it is inconsistent with the text" of the relevant statute of limitations. In this case, the Antiterrorism and Effective Death Penalty Act (AEDPA) provides a one-year statute of limitations for state prisoners seeking habeas relief, and sets forth in detail those events that trigger and toll the limitations period.

The question presented here is: Did Congress intend for courts to read other non-specified, open-ended tolling provisions into the statute?

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INTEREST OF *AMICI CURIAE*

The *amici* States, through their Attorneys General, respectfully submit their brief in support of petitioner. In 1996 Congress enacted AEDPA, which gives prisoners one year to challenge in federal court their final state court convictions. 28 U.S.C. § 2244(d)(1). Congress' purpose in enacting this statute of limitations was to expedite finality, promote certainty, and conserve limited state criminal justice resources.

This case presents the question of whether the judiciary may extend the limitations period for reasons beyond those provided in the statute. The resolution of this question is of great importance to the *amici* States. By creating non-statutory exceptions to the limitations period, federal courts have seriously undermined Congress' objectives. Judge-made exceptions to the statute inappropriately expose final state criminal judgments to prolonged jeopardy.

Moreover, states are forced to litigate the question of equitable tolling in potentially thousands of habeas cases each year. Because equitable tolling is highly fact-dependent and its application varies from case to case, the burden on states—both in terms of delay and costs—is substantial.

For these reasons, 32 States urge the Court to grant certiorari and resolve this important question.

REASONS FOR GRANTING THE PETITION

This Court has stated that equitable tolling is not permissible where it would be inconsistent with the text of the pertinent statute of limitations. In enacting 28 U.S.C.

§ 2244(d), Congress set forth in detail events that both trigger and toll the limitations period. This detailed statutory scheme evinces Congress' intent that courts may not read non-specified, open-ended exceptions into the statute.

Many courts of appeals—including the Ninth Circuit—have erroneously permitted tolling of § 2244(d) for so-called equitable reasons. Allowing prisoners to litigate the applicability of such non-statutory tolling has exacted a high price. Extending the statutory limitations period upsets the balance struck by Congress. And it undermines important finality and comity interests by exposing state criminal judgments to unduly prolonged uncertainty and jeopardy.

Moreover, courts are called upon to resolve claims of non-statutory tolling in potentially thousands of AEDPA cases each year. Because these tolling determinations are fact-intensive and made on a case-by-case basis, litigation over them can be especially time-consuming. Not infrequently, evidentiary hearings are ordered. Often, the limitations defense Congress gave to the states in AEDPA results in more litigation and a greater consumption of resources than would resolution of the prisoner's belated claims on their merits—something Congress certainly did not intend. The result is burdensome litigation that drains not just state criminal justice resources but federal court resources too.

Because the Ninth Circuit's decision is inconsistent with AEDPA and this Court's jurisprudence on judge-made tolling, and because of the substantial importance of the question to the *amici* States, the petition for a writ of certiorari should be granted.

ARGUMENT

I. The Ninth Circuit's Decision Conflicts with AEDPA and with This Court's Equitable Tolling Precedents

1. Prior to the enactment of AEDPA, no statute limited the time for filing federal habeas petitions. The result was that prisoners delayed the filing of habeas applications, often for years, undermining finality and prejudicing the states' ability to defend against the petition or re-try the criminal case.

Frustrated by these delays and wanting an eventual end to the review process, so that genuine finality could be accorded to state convictions, Congress in AEDPA enacted a fixed time limit for collateral attacks in federal court on a judgment of conviction. Under 28 U.S.C. § 2244(d)(1), "[a] 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." *See also* 28 U.S.C. § 2255, ¶ 6 (imposing one-year limitations period in which to file a motion to vacate a federal conviction). Section 2244(d)(1) provides that the one year limitations period runs from the latter of four events:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme

> Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

The statute also permits tolling for the time "during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending. . . . " 28 U.S.C. § 2244(d)(2); *see generally Evans* v. *Chavis*, 546 U.S. 189 (2006).

Thus, the AEDPA statute of limitations sets out a detailed list of the circumstances Congress deemed sufficient to justify expansion of the one-year period.

2. This Court has not resolved the precise question of whether the limitations period of § 2244(d)(1) (or § 2255, ¶ 6) may be tolled for other non-statutory "equitable" reasons. *Lawrence* v. *Florida*, ___ S. Ct. ___ 2007 WL 505972, *6 (U.S. Feb. 20, 2007) (No. 05-8820) ("We have not decided whether § 2244(d) allows for equitable tolling. . . . Because the parties agree that equitable tolling is available, we assume without deciding that it is."); *Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 n.8 (2005) ("We have never squarely addressed the question whether equitable tolling is applicable to AEDPA's statute of limitations."); *Duncan* v. *Walker*, 533 U.S. 167, 181 (2001) ("We . . . have no occasion to address the question that Justice Stevens raises concerning the availability of equitable tolling."); *cf. Pliler* v. *Ford*, 542 U.S. 225 (2004); *see also Solomon* v. *United States*, 467 F.3d 928, 937 (6th Cir. 2006) ("To date, the Supreme Court has yet to rule whether the judiciary is authorized to rewrite 28 U.S.C. § 2255 to include other 'equitable' grounds of tolling not provided for by Congress.") (Griffin, J., dissenting).

Nevertheless, this Court has made it clear that "[e]quitable tolling is not permissible where it is inconsistent with the text of the relevant statute." *United States* v. *Beggerly*, 524 U.S. 38, 48 (1998). The relevant statute in *Beggerly* provided that the twelve-year limitations period would not begin to run until the plaintiff "knew or should have known of the claim." *Id.* This Court found the statute thereby already "effectively allowed for equitable tolling" on a specified ground. *Id.* Given that, and the unusually generous limitations period, this Court held in a unanimous decision that "extension of the statutory period by additional equitable tolling would be unwarranted." *Id.* at 48-49; *see also Honda* v. *Clark*, 386 U.S. 484, 501 (1967) (whether a federal statute of limitations is subject to equitable tolling should be controlled by the question of whether equitable tolling would be "consistent with the overall congressional purpose" for the statute); *cf. Burnett* v. *New York Cent. R.R. Co.*, 380 U.S. 424, 426-27 (1965) ("The basic question to be answered in determining whether, under a given set of facts, a statute of limitations is to be tolled, is one of legislative intent whether the right shall be enforceable after the prescribed time . . . [T]he basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances.") (quotations omitted).

Only one year before deciding *Beggerly*, this Court in *United States* v. *Brockamp*, 519 U.S. 347 (1997), also a unanimous decision, held that equitable tolling was not permissible under the three-year tax-refund limitations period in 26 U.S.C. § 6511. The Court explained that, because limitations statutes ordinarily use fairly simple language, it is often plausible to read the statute as containing an implied equitable tolling exception. *Id.* at 350. The Court cited 42 U.S.C. § 2000e-16(c) (requiring suit for employment discrimination to be filed "[w]ithin 90

days of receipt of notice of final [EEOC] action . . . ") as language indicative of an ordinary limitations statute. *Id.* But the Court went on to explain that § 6511 used language that was "not simple." Instead, the statute set forth "its limitations in a highly detailed technical manner, that, linguistically speaking, cannot easily be read as containing implicit exceptions." *Id.* Under those circumstances, the Court held that the statute's detail, and the explicit listing of exceptions, "taken together indicate to us that Congress did not intend courts to read other unmentioned, open-ended, 'equitable' exceptions into the statute that it wrote." *Id.* at 352; *cf. Bowen* v. *City of New York*, 476 U.S. 467, 480 (1986) (equitable tolling of 60-day limitations period permissible where "contained in a statute that Congress designed to be 'unusually protective' of claimants" and was "consistent with the overall congressional purpose and nowhere eschewed by Congress.").

3. The rationale of *Beggerly* and *Brockamp* applies here. Although 28 U.S.C. § 2244(d)(1)(D) sets forth a default limitations period commencing from the date the conviction becomes final, the statute includes detailed and case-specific extensions bearing directly on the diligence of the prisoner.

a. For example, notwithstanding the default limitations period, an extended limitations period will apply to the entire petition if the prisoner's ability to file the petition within the default period was impeded "by State action in violation of the Constitution or laws of the United States," so long as the prisoner was diligent (i.e., if he filed within one year) after the impediment was removed. 28 U.S.C. § 2244(d)(1)(B). This is one way in which the statute effectively tolls the limitations period

(for the entire petition) based upon the diligence of the prisoner—i.e., based on case-specific equitable considerations. *See Beggerly*, 524 U.S. at 48.

And that is not the only form of equitable tolling built into the statute. Section 2244 (like § 2255) also effectively tolls the limitations period (again, as to the entire petition) by recognizing, as a mark of diligence, the prisoner's proper filing of petitions for post-conviction relief in state court. Thus, the limitations period is tolled by excluding the time when such a state petition is pending. 28 U.S.C. § 2244(d)(2).

Congress also did not limit statutory tolling to the filing of the overall petition. Section 2244 permits individual claims to be presented, even if other claims in a petition are untimely. Thus, if this Court recognizes a new right and immediately and expressly makes the right cognizable on collateral review, a prisoner will be deemed diligent so long as he presents his claim invoking the new right within one year thereafter. 28 U.S.C. § 2244(d)(1)(C).

Likewise, the statute accounts for the prisoner's diligent efforts to discover the "factual predicate" of an individual claim. So long as the prisoner files within one year of the date upon which he knew or should have known of that factual predicate, the individual claim may be considered. 28 U.S.C. § 2244(d)(1)(D).

The foregoing statutory detailing demonstrates that, when fashioning the limitations statute, Congress considered and balanced equitable factors in determining (1) what should be the default limitations period, (2) what causes for delayed filing beyond that period should *not* be counted against a prisoner, and (3) how long (no more than

one year) the prisoner should have to respond to such causes. In short, the detailed scheme must be deemed to have "already effectively allowed for equitable tolling." *Beggerly*, 524 U.S. at 48.

Further, Congress allows a prisoner to wait until one year past the finality of his conviction on direct review—even though he often will have learned of the relevant facts for his claim years before (e.g., at the time of trial). That itself is an allowance of "unusually generous nature," *Beggerly*, 524 U.S. at 48-49, which also militates against open-ended ad hoc tolling. *See, e.g.,* 42 U.S.C. § 2000e-16(c) (requiring suits to be filed "within 90 days of receipt of notice of final action.").

Lastly, the interest in finality is extremely important. *See Beggerly*, 524 U.S. at 49. At issue in these federal habeas proceedings is nothing less than the power of the sovereign states to enforce their judgments in criminal cases. The states have a "strong interest in preserving the finality" of such judgments. *Henderson* v. *Kibbe*, 431 U.S. 145, 154 n.13 (1977). That interest cannot be dismissed as less important than the interest in settling the title to a plot of land—an interest found to be of sufficient importance in *Beggerly* itself. 524 U.S. at 49.

These statutory features, and the importance of the interest in finality, compel application of the logic of *Beggerly* to bar non-statutory "equitable" tolling of § 2244(d)'s limitations period. In striking the balance it did in AEDPA, Congress identified those equitable considerations which Congress believed should affect the one-year limitations period. Congress provided for tolling when state actors are chargeable for the delayed filing, 28 U.S.C. § 2244(d)(1)(B), and when the timing of this Court's

decision accounts for delayed filing, § 2244(d)(1)(C), and when the state courts are chargeable for the delayed filing (while a state petition is pending before a state court), § 2244(d)(2). In light of such careful consideration by Congress, *Beggerly* teaches that the balance has been *statutorily* struck as to what causes of delayed filing are not to be chargeable against the prisoner. Under the logic of *Beggerly*, it follows that Congress intended that other causes of delayed filing *are* to be chargeable against the prisoner—and thus not to be predicates for non-statutory "equitable" tolling. *Beggerly*, 524 U.S. at 48-49.

b. *Brockamp* reinforces this conclusion. It may be observed, for example, that AEDPA's tolling provisions are detailed and delineated. Some logically apply to an entire petition, while others logically apply on a claim-by-claim basis. These explicit provisions, taken together, indicate that "Congress did not intend courts to read other unmentioned, open-ended, 'equitable' exceptions into the statute that it wrote." *Brockamp*, 519 U.S. at 352. Rather, the "most natural reading of [the statute] is that Congress implicitly excluded a general [] rule by explicitly including a more limited one." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001); *see United States* v. *Pollard*, 161 F. Supp. 2d 1, 12 (D.D.C. 2001) ("The fact that Congress chose to expressly enumerate the circumstances that would start and stop the statute of limitations [in § 2255] undermines defendant's argument that Congress also chose to allow non-specified means to toll the statute of limitations. It appears that Congress did not intend for the courts to interpret the statute as permitting other open-ended means of tolling the statute of limitations."); *Giles* v. *United States*, 6 F. Supp. 2d 648, 650 (E.D. Mich. 1998)

("[T]he language of § 2255 indicates that Congress intended to limit a federal court's discretion in tolling the one year time limit. Section 2255 expressly lists four different events, the latest of which determines when the limitations period begins to run. 28 U.S.C. § 2255. The detail of § 2255 and its direct and express determination of when the time limit begins indicates that Congress did not intend to permit courts to read other unmentioned and open-ended equitable exceptions into the statute.") aff'd on other grounds sub nom. *United States* v. *Giles*, 238 F.3d 425 (6th Cir. 2000).

c. Further support for this conclusion arises from the maxim *"expressio unius est exclusio alterius"*—the presumption that, in a statute, "the expression of one is the exclusion of other." *United States* v. *Wells Fargo Bank*, 485 U.S. 351, 357 (1988); *accord Leatherman* v. *Tarrant Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993). This presumption is the default rule when Congress has designated a specific condition or event (e.g., the occurrence of the facts set forth in § 2244(d)(1)(B), (C), (D) and (d)(2)) as having a given effect (e.g., the tolling of the standard limitations period) in a given situation. The effect of the presumption is that other non-designated conditions or events cannot be considered to have the same effect in the given situation. The presumption applies unless it affirmatively would be contrary to, or affirmatively "would render [the] [legislative provision] inconsistent" with, legislative intent. *Pauley* v. *Bethenergy Mines, Inc.*, 501 U.S. 680, 703 (1991); *accord Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 188 (1978); *National R. R. Passenger Corp.* v. *Passengers Ass'n of R. R. Passengers*, 414 U.S. 453, 458 (1974). Here, it cannot reasonably be disputed that Congress' intent in enacting a

limitations period was to provide a cut-off period after which prisoners' claims would be precluded from federal review, irrespective of the merits of the claims. Refusal to permit additional, judicial "equitable" tolling is not inconsistent with that intent.

d. While exclusion of non-statutory grounds for tolling would be presumed here even if Congress had been silent on the question of judge-created equitable tolling, the conclusion that such grounds are excluded becomes irresistible here for a further reason: Congress has not been silent on the question. In enacting AEDPA, Congress in fact considered the issue of judicial equitable tolling but chose to allow it only in another context—that of expedited capital habeas proceedings. The capital case provision in 28 U.S.C. § 2263(a) prescribes a less-generous 180-day limitations period for seeking habeas relief, and that period commences on the date of state court finality.[1] Only under this more restricted limitations scheme did Congress permit a federal court to grant equitable tolling, for up to 30 days if "a showing of good cause is made for the failure to file the habeas corpus application within the time period established by this section." 28 U.S.C. § 2263(b)(3). The necessary conclusion is that Congress' omission of analogous provisions for judicial equitable tolling under § 2244(d) was intentional, and that for courts to engage in such judicial tolling is directly contrary to Congress' intent. *Cf. Lindh* v. *Murphy*, 531 U.S. 320, 330-36

[1] Under this statute, the time for seeking certiorari in this Court will toll the running of the period only if in fact a petition is filed and only once the petition is filed. 28 U.S.C. § 2263(b)(1); *compare* 28 U.S.C. § 2244(d)(1)(A) (in the standard case, time for seeking certiorari credited to prisoner even if no certiorari petition ever filed).

(1997) (drawing the negative implication that chapter 153 of AEDPA did not apply to pending cases from the fact that chapter 154, addressing a similar issue, expressly provided its applicability to pending cases).

e. Finally, in interpreting statutes of limitations, this Court has looked to the burden equitable tolling would have on government operations. *See Brockamp*, 519 U.S. at 352-53. Here, reading equitable tolling into § 2244(d) would impose significant burdens on state governments. Each year, states are forced to litigate equitable tolling in potentially thousands of habeas cases. And, because equitable tolling determinations are fact-intensive and made on a case-by-case basis, they are especially time-consuming. The result is burdensome litigation that drains state criminal justice resources—and federal resources—in precisely the type of case Congress intended to be summarily dismissed.

4. It is true, as *amici* acknowledged earlier (see p. 2, *ante*), that most federal circuits have concluded that § 2244(d) remains subject to judge-created tolling.[2] But several federal circuits have openly expressed doubt about such non-statutory tolling under AEDPA. *E.g., David* v. *Hall*, 318 F.3d 343, 346 (1st Cir. 2003) ("section 2244(d)

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[2] *E.g., Neverson* v. *Farquharson*, 366 F.3d 32, 41 (1st Cir. 2004); *Baldayaque* v. *United States*, 338 F.3d 145, 150-51 (2d Cir. 2003); *Dunlap* v. *United States*, 250 F.3d 1001, 1008-09 (6th Cir. 2001); *Kreutzer* v. *Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000); *Harris* v. *Hutchinson*, 209 F.3d 325, 329-30 (4th Cir. 2000); *Taliani* v. *Chrans*, 189 F.3d 597, 598 (7th Cir. 1999); *Sandvik* v. *United States*, 177 F.3d 1269, 1271-72 (11th Cir. 1999) (per curiam); *Fisher* v. *Johnson*, 174 F.3d 710, 713 (5th Cir. 1999); *Miller* v. *N.J. State Dep't of Corrections*, 145 F.3d 616, 617-18 (3d Cir. 1998); *Miller* v. *Marr*, 141 F.3d 976, 978 (10th Cir. 1998); *Calderon* v. *United States Dist. Court*, 128 F.3d 1283, 1288-89 (9th Cir. 1997), overruled on other grounds by 163 F.3d 530 (9th Cir. 1998) (en banc).

comprises six paragraphs defining its one-year limitations period in detail and adopting very specific exceptions. Congress likely did not conceive that the courts would add new exceptions and it is even more doubtful that it would have approved of such an effort."); *Donovan* v. *Maine*, 276 F.3d 87, 92 (1st Cir. 2002) ("whether, as a matter of law, equitable tolling is available, even in a factually appropriate case, in respect to section 2244(d)(1) . . . is not free from doubt."); *Taliani*, 189 F.3d at 598 ("it is unclear what room remains for importing the judge-made doctrine of equitable tolling. . . ."); *see also Solomon*, 467 F.3d at 935 (equitable tolling conflicts with the detailed provisions of AEDPA) (Griffin, J., dissenting). Some courts have gone even further, outright rejecting judicial tolling under AEDPA as inconsistent with the text of the statute. *See, e.g., Pollard*, 161 F. Supp. 2d at 12 ("Congress did not intend that § 2255 motions be subject to equitable tolling."); *Giles*, 6 F. Supp. 2d at 649-50 ("[T]he language of § 2255 indicates that Congress intended to limit a federal court's discretion in tolling the one year time limit."); *cf. Hernandez* v. *Sullivan*, 397 F. Supp. 2d 1205, 1207 n.2 (C.D. Cal. 2005).

Most of the federal circuits that have judicially tolled AEDPA's statute of limitations have erred in failing to consider whether such tolling is consistent with the text of the statute, as *Beggerly* requires. *Solomon*, 467 F.3d at 940 (describing circuit cases upholding equitable tolling under the AEDPA as "follow-the-leader decisions" containing "little analysis" and failing to acknowledge *Beggerly* and *Brockamp*) (Griffin, J., dissenting). Instead, circuit courts have mostly concluded that, because § 2244(d) is a statute

of limitations, rather than a jurisdictional bar, it is therefore subject to judicial tolling.[3] But this Court in *Brockamp* and *Beggerly* did not simply ask whether the applicable statute of limitations was "jurisdictional." Rather, this Court examined the availability of equitable tolling by looking at the language and purpose of the statute. To say that the § 2244(d) limitations period is not jurisdictional merely begs the paramount question of "whether the judiciary is authorized to rewrite 28 U.S.C. § 2255 to include other 'equitable' grounds of tolling not provided for by Congress." *Solomon*, 467 F.3d at 940 (Griffin, J., dissenting).

A proper understanding of the text of § 2244(d) and the purposes for its enactment demonstrates that Congress did not intend for the judiciary to read further non-statutory exceptions into the statute. Certiorari should be granted to vindicate Congress' plan in AEDPA and to ensure that the lower federal courts apply this Court's holdings.

II. NON-STATUTORY TOLLING OF AEDPA'S LIMITATIONS PERIOD IMPOSES ILLOGICAL, COSTLY, AND UNNECESSARY BURDENS ON STATE RESOURCES

Congress enacted the AEDPA statute of limitations to eliminate needless delay, conserve limited state resources, and expedite finality. *See Day* v. *McDonough*, __ U.S. __,

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[3] *Dunlap*, 250 F.3d at 1004 & n.1; *Harris*, 209 F.3d at 328-30; *Smith* v. *McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000); *Taliani*, 189 F.3d at 598; *Sandvik*, 177 F.3d at 1271-72; *Moore* v. *United States*, 173 F.3d 1131, 1134 (8th Cir.1999); *Davis* v. *Johnson*, 158 F.3d 806, 810-11 (5th Cir. 1998); *Miller*, 145 F.3d at 617-18; *Miller*, 141 F.3d at 978; *Calderon*, 128 F.3d at 1288.

126 S. Ct. 1675, 1681 (2006) (citing *Acosta* v. *Artuz*, 221 F.3d 117, 123 (2d Cir. 2000)); *Duncan*, 533 U.S. at 179 (purpose of AEDPA is to reduce "the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review."); *id.* (AEDPA's one-year limitations period "quite plainly serves the well-recognized interest in the finality of state court judgments"); *accord Rhines* v. *Weber*, 544 U.S. 269, 276 (2005); *see* Federal Habeas Corpus Reform: Eliminating Prisoners' Abuse of the Judicial Process, Hearing on S. 623 before the S. Comm. on the Judiciary, 104th Cong. 3 (1996) (remarks of Sen. Hatch, Chairman (one of AEDPA's original authors) that the goal of the habeas reform bill is to "eliminate unnecessary delay," "maintain[] ... the finality of the decisions of our State courts," and "get some effective resolution of the ... lengthy, frivolous appeal problems."); 141 Cong. Rec. S7840 (daily ed. June 7, 1995) (statement of Sen. Biden) ("I agree with my Republican colleagues from Utah and Pennsylvania that we ought to have a strict statute of limitations. . . .").

1. But the widespread practice of needlessly litigating equitable tolling issues has become increasingly burdensome to the states and to the judiciary. In 2006 alone, the doctrine of equitable tolling was apparently considered in over 1,500 federal habeas cases.[4]

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[4] Based on existing data, it is difficult to know precisely what percent of federal habeas cases involve equitable tolling issues. Federal courts currently do not maintain any statistics that identify the reasons why federal habeas petitions are dismissed. *See* U.S. District Courts—Civil Cases Terminated by Nature of Suit and Action Taken, During the 12-Month Period Ending September 30, 2005, available at http://www.uscourts.gov/judbus2005/contents.htmlappendices/c04sep01.pdf (detailing the number

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Compounding this problem is the fact-intensive nature of the equitable tolling determination. A prisoner seeking equitable relief typically must demonstrate the existence of an extraordinary circumstance. While there are general principles to assist courts in making this determination, there are no "bright-line" rules defining what is an extraordinary circumstance and what is not. *Fisher*, 174 F.3d at 713. Rather, the extraordinary-circumstance inquiry is "highly fact-dependent." *Whalem/Hunt* v. *Early*, 233 F.3d 1146, 1148 (9th Cir. 2000) (en banc) (per curiam). Therefore, district courts cannot simply look to existing precedent in determining whether equitable relief is warranted, but instead must review each pertinent claim individually on a case-by-case basis to evaluate whether the circumstances alleged are extraordinary. *Alexander* v. *Cockrell*, 294 F.3d 626 (5th Cir. 2002) (except where a particular argument in favor of equitable tolling has been rejected outright, the court must consider the individual facts and circumstances of the case).[5]

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of habeas matters dismissed without explanations of the reason for their dismissal). A search of the WestLaw ALLFEDS data base indicates there were 1,512 federal habeas opinions issued in 2006 that referred to equitable tolling of the AEDPA limitations period. Because not all federal court decisions are included in the WestLaw data base, undoubtedly there were more equitable tolling decisions in 2006 than this number indicates.

[5] Some of the varied circumstances prisoners have litigated as grounds for equitable tolling include attorney negligence, *Wilson* v. *Battles*, 302 F.3d 745, 748 (7th Cir. 2002); attorney incapacity, *Modrowski* v. *Mote*, 322 F.3d 965, 968 (7th Cir. 2003); the conduct of fellow inmates, *Paige* v. *United States*, 171 F.3d 559, 560-61 (8th Cir. 1999); a prisoner's *pro se* status, *Donovan*, 276 F.3d at 94; the time expended by a prisoner searching for counsel, *Jihad* v. *Hvass*, 267 F.3d 803, 806 (8th Cir. 2001); the closeness of meeting the limitations deadline, *Lattimore* v. *Dubois*, 311 F.3d 46, 53-54 (1st Cir. 2002); the prisoner's legal abilities, *Marsh* v. *Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000); the petitioner's language abilities, *Cobas* v. *Burgess*, 306 F.3d 441, 444 (6th

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This struggle to decide what is "extraordinary" results in time-consuming litigation, the expenditure of limited judicial and governmental resources, and significant delays. Lisa L. Bellamy, *Playing For Time: The Need for Equitable Tolling of the Habeas Corpus Statute of Limitations*, 32 Am. J. Crim. L. 1, 53-54 (2004) (equitable tolling in AEDPA cases results in "a complicated, inconsistent procedural morass that is difficult for the most knowledgeable legal scholar to understand, let alone a pro se habeas petitioner.").

In addition to deciding whether there are extraordinary circumstances, courts must make the additional factual determination of whether the prisoner was pursuing his rights diligently. Like the extraordinary circumstance determination, there are no set guidelines for deciding what constitutes reasonable diligence. Instead, courts must engage in a highly factual analysis of the totality of the circumstances. Typically, this requires a close examination of the specific timing of various events both with respect to the filing of the federal habeas petition and the period the petitioner was exhausting state court remedies. *See, e.g., Lacava* v. *Kyler*, 398 F.3d 271, 277 (3d Cir. 2005). And, in order to determine whether extraordinary circumstances *caused* the prisoner to file an

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Cir. 2002); transfers between prison facilities, *Hardy* v. *Conway*, 299 F. Supp. 2d 159, 161 (E.D.N.Y. 2004); solitary confinement, *id.*; lockdowns, *id.*; the availability of transcripts to the prisoner, *Gassler* v. *Bruton*, 255 F.3d 492, 495 (8th Cir. 2001); the severity of the sentence, *Trenkler* v. *United States*, 268 F.3d 16, 27 (1st Cir. 2001); a change in controlling law, *Shannon* v. *Newland*, 410 F.3d 1083 (9th Cir. 2005); the petitioner's physical or mental illness, *Laws* v. *Lamarque*, 351 F.3d 919 (9th Cir. 2003); the lack of an adequate prison law library, *Whalem/Hunt*, 233 F.3d at 1146; and the confiscation of the prisoner's legal papers, *Valverde* v. *Stinson*, 224 F.3d 129, 133-35 (2d Cir. 2000).

untimely petition, "courts are forced to conduct painstaking analysis to calculate the precise duration of the alleged extraordinary circumstance." Bellamy, *supra*, at 30; *see also Spitsyn* v. *Moore*, 345 F.3d 796, 799 (9th Cir. 2003) (courts must determine whether the "extraordinary circumstance" was the cause of the petitioner's untimeliness).

Particularly disruptive is the ease with which prisoners obtain evidentiary hearings. So long as the allegations, if true, would entitle the prisoner to equitable tolling, an evidentiary hearing is conducted. *Laws*, 351 F.3d at 919. This allows prisoners—based on unsubstantiated, conclusory allegations—to effectively stop the collateral review process in its tracks and substantially delay the federal proceeding. And, once an evidentiary hearing is ordered, counsel is usually appointed followed by motions to conduct discovery or expand the record. *See, e.g., Laws*, 351 F.3d at 924 (district court on remand shall order discovery, expansion of the record, or an evidentiary hearing to assess equitable tolling claim). Further, if the prisoner has alleged the existence of a mental condition as grounds for equitable tolling, a mental health expert could be appointed. *See, e.g., Nara* v. *Frank*, 264 F.3d 310, 320 (3d Cir. 2001).

2. The resultant delays undermine the states' interest in finality, which is "essential to both the retributive and the deterrent functions of criminal law." *Calderon* v. *Thompson*, 523 U.S. 538, 555 (1998). Inroads on the concept of finality "tend to undermine confidence in the integrity of our procedures and inevitably delay and impair the orderly administration of justice." *Custis* v. *United States*, 511 U.S. 485, 497 (1994). The more prolonged the review process, the greater the risk that the

passage of time, erosion of memory, and dispersion of witnesses will preclude any retrial of the defendant and "reward the accused with complete freedom from prosecution." *Engle* v. *Isaac*, 456 U.S. 107, 127-28 (1982); *David*, 318 F.3d at 347 ("There is a strong public interest in the prompt assertion of habeas claims. Normally, the grant of habeas relief leaves the state free to retry the petitioner, but this becomes increasingly hard to do as memories fade, evidence disperses and witnesses disappear.") Permitting tolling beyond that provided by the statute introduces an additional element of uncertainty concerning the finality of state judgments—a result inconsistent with the goals of AEDPA and the criminal justice system.

3. This case illustrates how the judicial application of a non-statutory tolling exception undermines the purposes of AEDPA. It is undisputed that inmate Kephart's federal petition was untimely. Yet he was able to evade dismissal and obtain an evidentiary hearing by alleging in conclusory fashion that the prison library was inadequate. So far, the equitable tolling issue has resulted in litigation before the magistrate judge, the district judge, and the Ninth Circuit. There will be an evidentiary hearing, followed by findings and recommendations from the magistrate judge and then a decision from the district judge. Undoubtedly, the equitable tolling issue will be the subject of a second appeal should the prisoner fail to obtain equitable relief in the district court. Certainly this is not what Congress intended when it enacted § 2244(d).

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Dated: February 23, 2007

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